SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 391.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, PETITIONER,

vs.

JOHN W. KINNEY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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1 STATE OF NEW YORK:

Supreme Court, Appellate Division, Fourth Department.

Supreme Court, Erie County.

JOHN W. KINNEY, Plaintiff,

against

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Defendant.

Notice of Appeal from Judgment.

SIRS:

Please take notice, that the defendant in the above entitled action hereby appeals to the Supreme Court, Appellate Division, Fourth Department, from the judgment entered in the office of the Clerk of the County of Erie on the 19th day of April, 1919, in favor of the plaintiff and against the defendant, for the sum of $32,000.00 damages and $3,853.99 costs, and the defendant appeals from each and every part of said judgment.

Dated: May 3, 1919.

Yours, etc.,

HOYT & SPRATT,
Attorneys for Defendant.

Office & P. O. Address, 810-826 Fidelity Bldg., Buffalo, New York.

2 To Hamilton Ward, Esq., Attorney for Plaintiff, and to the Clerk of the County of Erie.

Notice of Appeal from Order.

Supreme Court, Erie County.

JOHN W. KINNEY, Plaintiff,

against

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Defendant.

SIRS:

Please take notice, that the defendant in this action appeals to the Appellate Division of the Supreme Court, Fourth Department, from an order made herein on the 13th day of February, 1919, and entered in the office of the Clerk of Erie County on the same date, denying defendant's motion for new trial made upon the minutes and upon all the grounds specified in Section 999 of the Code of Civil

Procedure; except that the verdict was inadequate, and upon
3 all the exceptions, and the defendant appeals from each and every part of said order.

Dated, March 13, 1919.

Yours, etc.,

HOYT & SPRATT,
Attorneys for Defendant.

810-826 Fidelity Building, Buffalo, N. Y.

To Hamilton Ward, Esq., Attorney for Plaintiff.
To Clerk of Erie County.

Summons.

Supreme Court, Erie County.

JOHN W. KINNEY

against

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY and MICHIGAN CENTRAL RAILROAD COMPANY.

To the above-named defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attor-
4 ney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial to be held in the County of Erie.

Dated this 25th day of June, 1909.

HAMILTON WARD,
Attorney for Plaintiff.

Office and P. O. Address, 7-8 Erie County Savings Bank Bldg., Buffalo, N. Y.

Complaint.

Supreme Court, Erie County.

JOHN W. KINNEY

against

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY and MICHIGAN CENTRAL RAILROAD COMPANY.

The above named plaintiff complains of the defendants by his attorney, Hamilton Ward, and for his cause of action alleges:

5 First. That the defendant New York Central and Hudson River Railroad Company, is a domestic corporation, engaged

in the business of operating a steam railroad in and through various portions of the State of New York, and especially within the City of Buffalo, N. Y.

Second. That the defendant Michigan Central Railroad Company, is a foreign corporation, incorporated under the Laws of the State of Michigan, and is engaged in running cars and trains in and through various portions of the City of Buffalo, and especially over the Niagara Falls Branch tracks of the New York Central and Hudson River Railroad Company, within such City of Buffalo.

Third. That heretofore and on the 12th day of October, 1908, and for sometime prior thereto, the plaintiff had been in the employ of the defendant, New York Central and Hudson River Railroad Company, as a locomotive engineer, and was engaged in operating a locomotive owned by such defendant in and over its tracks within the State of New York.

Fourth. That heretofore and on the 12th day of October, 1908, the plaintiff was directed by the defendant, New York Central and Hudson River Railroad Company, to operate its engine to which was attached to the front thereof, a caboose, over a certain track in
the City of Buffalo, N. Y., belonging to said New York Cen-
6 tral Co., defendant, known as the "wye" track, which said track crosses the Niagara Falls Branch track of the New York Central and Hudson River Railroad Company near Hertel avenue in said City of Buffalo. That the engine furnished by the defendant, New York Central and Hudson River Railroad Company, to the plaintiff, was defective, in that it leaked steam, which defect could have been discovered and remedied by the said defendant by reasonable and proper care and tests. That at the point where the said wye track crossed the Niagara Falls Branch track of the defendant, New York Central and Hudson River Railroad Company, the said defendant provided a signal tower and a dwarf signal equipped with green and purple lights, and so arranged that when a green light was disclosed, it was an assurance to persons using the tracks that the same were safe, and when a purple light was disclosed, it was a warning of danger. That other signals were provided by the said defendant upon the Niagara Falls Branch tracks to indicate whether or not the trains coming upon those tracks would interfere with trains crossing upon such wye tracks, all of which signals and lights were operated by the defendant, New York Central and Hudson River Railroad Company, in such tower.

That the said New York Central and Hudson River Railroad Company, further provided persons to have physical control and
direction of the movement of such switches, and of the move-
7 ment of the locomotive engines, cars and trains of such defendant. That as the engine upon which the plaintiff was traveling approached the intersection of the wye track with the main line track, at a point about 400 feet from the said signal, the same was set by the defendant, New York Central and Hudson River Railroad Company through employees in charge of the same, to

show a green light. That at that time, there was upon the front end of the caboose, which preceded the said engine, an employee of the said defendant, having for the time being physical control and direction of the movement of such car and engine, whose duty it was to signal to the plaintiff whether he should proceed or stop. That after the plaintiff observed the said green light and until he had passed the said signal, which was situated about 35 feet from the said intersecting tracks, the steam escaped to such an extent from the said defective engine that the plaintiff was unable to see the said signal. That, nevertheless, the employee of the defendant, New York Central and Hudson River Railroad Company stationed upon the front end of the caboose, as aforesaid, signalled to the plaintiff in such a way that his signal appeared to be a signal to proceed, and the plaintiff did proceed with the said engine to such intersection. That as the engine reached the said point of intersection, a train operated by the defendant, Michigan Central Railroad Company over the tracks of the said defendant, New York Central and Hudson River Railroad Company, collided with
8 the side of the engine upon which the plaintiff was riding, overturning the said engine, and causing the injuries to the plaintiff to be hereafter set forth.

And the plaintiff further alleges that the defendant, New York Central and Hudson River Railroad Company, failed and omitted to give proper signals to the train of the defendant, Michigan Central Railroad Company, to advise them that the plaintiff had been instructed to, and was about to cross the said crossing, and that the defendant, Michigan Central Railroad Company carelessly and negligently disregarded such signals as were given, and the approach of the plaintiff to the said crossing, and carelessly and negligently proceeded and collided with him.

And the plaintiff further alleges upon information and belief, that the defendant, New York Central and Hudson River Railroad Company, failed to provide safe and proper signals and switches; that the size of the said dwarf signal was insufficient; that its lights and the glass therein were of improper color, and that such signal was defective in operation; and that the persons entrusted by the said New York Central and Hudson River Railroad Company with the physical control of such switches, cars and signals, carelessly and negligently failed to warn the plaintiff of the approach of the said Michigan Central Railroad Company's train, but on the contrary, signalled to him to proceed to cross the said tracks; and that if they did change such signals, changed the same while plaintiff's engine
9 was in motion, and before it had come to a stop, and when it was close to such intersection, contrary to the rules and regulations of the defendant, New York Central and Hudson River Railroad Company.

And the plaintiff further alleges upon information and belief that a derailing switch is a common, safe and well known device for preventing collisions at track intersections, and that such device is in common and general use in the City of Buffalo and elsewhere, and that the defendant, New York Central and Hudson River Rail-

road Company carelessly and negligently failed to provide such crossings with such derailing switch, which had it been present, would have prevented the accident.

And plaintiff further alleges upon information and belief that the cross-overs, switches and signals in and about the point of the collision were unsafe, defective and insufficient, which constituted a part of the ways, works and machinery of the defendant, New York Central and Hudson River Railroad Company; that in order to cross from the main line tracks of the defendant, New York Central and Hudson River Railroad Company, it was necessary to go on the southerly track, and against the current of traffic, because of the failure of the said defendant to provide a proper cross-over on the northerly track, where trains could have proceeded with the current of traffic, and under safe and sufficient signals.

10 And the plaintiff further alleges that as a result of the said accident, and the careless and negligent acts of the defendants before set forth, and without any fault or neglect on his part, his right leg was cut off, he received a fracture of the left leg and ankle, his back was injured, he suffered and will continue to suffer great pain, has been crippled for life and prevented from pursuing his business and earning a livelihood; he has been put to much expense for nursing, medicines and medical attendance, artificial limbs and other necessary appliances, and has been damaged in the sum of Thirty Thousand Dollars ($30,000.00).

And the plaintiff further alleges that heretofore and before the commencement of this action, he caused to be duly served upon the defendant, New York Central and Hudson River Railroad Company, a due and sufficient notice in writing, as required by Chapter 600 of the Laws of 1902, a copy of which is hereunto attached and marked "A."

Wherefore plaintiff demands judgment against said defendants in the sum of Thirty Thousand Dollars ($30,000.00), besides the costs of this action.

HAMILTON WARD,
Attorney for Plaintiff.

Office and P. O. Address, 7-8 Erie County Savings Bank Bldg., Buffalo, N. Y.

11 A.

To the New York Central and Hudson River Railroad Company:

Take Notice:

The undersigned has a claim and cause of action against you, and hereby notifies you thereof, in accordance with Chapter 600 of the Laws of 1902. He was injured while in your employ on the 12th day of October, 1908, at North Buffalo Junction in the City of Buffalo, N. Y.; that the cause of his injury was a collision which occurred between engine No. 2499 belonging to you, operated by him, and Michigan Central engine No. 7916 and New York Central

engine No. 3784; that such collision was brought about through your negligence and carelessness and the negligence and carelessness of your employees in failing to provide proper rules and regulations for the operation of your trains, cars, switches and signals, and in failing to properly operate the signals, lights and switch towers at the point of the accident, and in failing to provide the undersigned with competent fellow servants, and failing to warn him as he approached the said point of collision of the dangers then and there existing, and that such collision was further due to your failure to provide the undersigned with a safe and suitable engine, and to the fact that the engine operated by the undersigned was defective and unsafe, and leaked steam, as to obscure the vision of the undersigned, and to prevent him from operating the same in a safe and proper manner.

Dated February 6th, 1909.

JOHN W. KINNEY.

12 STATE OF NEW YORK,
County of Erie,
City of Buffalo, ss:

John W. Kinney, being duly sworn, deposes and says that he is plaintiff in this action; that he has read the foregoing complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

JOHN W. KINNEY.

Sworn to before me, this 29th day of June, 1909.

MARY F. McGOVERN,
Commissioner of Deeds in and for the City of Buffalo, N. Y.

Amended Complaint.

Supreme Court, Erie County.

JOHN W. KINNEY

against

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY.

Plaintiff, for his amended complaint in the above entitled action, complains of the above named defendant, by his attorney, Hamilton Ward, and for his cause of action alleges:

13 First. That the defendant now is, and at all times hereinafter mentioned was a domestic railroad corporation, engaged in the business of operating a steam railroad in and through various portions of the State of New York, and especially within the City of Buffalo, N. Y.

Second. That heretofore and on the 12th day of October, 1908, and for sometime prior thereto, the plaintiff had been in the employ of the defendant as a locomotive engineer, and was engaged in operating a locomotive owned by such defendant in and over its tracks within the State of New York.

Third. That heretofore and on the 12th day of October, 1908, the plaintiff was directed by the defendant to operate its engine, to which was attached to the front thereof, a caboose, over a certain track in the City of Buffalo, N. Y., belonging to the said defendant, known as the "wye" track, which said track crosses the Niagara Falls Branch track of the defendant near Hertel Avenue in said City of Buffalo; That the engine furnished by the defendant to the plaintiff was defective, in that it leaked steam, which defect could have been discovered and remedied by the said defendant by reasonable and proper care and tests. That at the point where the said wye track crossed the Niagara Falls Branch track of the defendant, the said defendant provided a signal tower and a dwarf signal equipped
with green and purple lights, and so arranged that when a
14 green light was disclosed, it was an assurance to persons using
the tracks that the same were safe, and when a purple light was disclosed, it was a warning of danger. That other signals were provided by the said defendant upon the Niagara Falls Branch tracks to indicate whether or not the trains coming upon those tracks would interfere with trains crossing upon such wye tracks, all of which signals and lights were operated by the defendant in such tower.

That the said defendant further provided persons to have physical control and direction of the movement of such switches, and of the movement of the locomotive engines, cars and trains of such defendant. That as the engine upon which the plaintiff was traveling approached the intersection of the wye tracks with the main line track, at a point about 400 feet from the said signal, the same was set by the defendant, through employees in charge of the same, to show a green light. That at that time, there was upon the front end of the caboose, which preceded the said engine, an employee of the said defendant, having for the time being, physical control and direction of the movement of such car and engine, whose duty it was to signal to the plaintiff whether he should proceed or stop. That after the plaintiff observed the said green light and until he had passed the said signal, which was situated about 35 feet from the
said intersecting tracks, the steam escaped to such an extent
15 from the said defective engine that the plaintiff was unable
to see the said signal. That, nevertheless, the employee of the defendant stationed upon the front end of the caboose, as aforesaid, signalled to the plaintiff in such a way that his signal appeared to be a signal to proceed, and the plaintiff did proceed with the said engine to such intersection. That as the engine reached the said point of intersection, a train operated by the Michigan Central Railroad Company, over the tracks of the said defendant, collided with the side of the engine upon which the plaintiff was riding, over-

turning the said engine, and causing the injuries to the plaintiff to be hereafter set forth.

And the plaintiff further alleges that the defendant failed and omitted to give proper signal to the train of the said Michigan Central Railroad Company, to advise them that the plaintiff had been instructed to, and was about to cross the said crossing, and

The plaintiff further alleges upon information and belief, that the defendant failed to provide safe and proper signals and switches; that the size of the said dwarf signal was insufficient; that its lights and the glass therein were of improper color, and that such signal was defective in operation; and that the persons entrusted by the said defendant with the physical control of such switches, cars and signals, carelessly and negligently failed to warn the plaintiff of the approach of the said Michigan Central Railroad Company's
16 train, but on the contrary, signalled to him to proceed to cross the said tracks; and that if they did change such signals, changed the same while plaintiff's engine was in motion, and before it had come to a stop, and when it was close to such intersection, contrary to the rules and regulations of the defendant and

The plaintiff further alleges upon information and belief that a derailing switch is a common, safe and well known device for preventing collisions at track intersections, and that such device is in common and general use in the City of Buffalo, and elsewhere, and that the defendant, carelessly and negligently failed to provide such crossings with such derailing switch, which had it been present, would have prevented the accident.

And plaintiff further alleges upon information and belief that the crossovers, switches and signals in and about the point of the collision were unsafe, defective and insufficient; which constituted a part of the ways, works and machinery of the defendant; that in order to cross from the main line tracks of the said defendant, it was necessary to go on the southerly track, and against the current of traffic, because of the failure of the said defendant to provide a proper crossover on the northerly track, where trains could have proceeded with the current of traffic, and under safe and sufficient signals.

17 And plaintiff further alleges upon information and belief, that both the plaintiff and the defendant, at the times, and in the manner above set forth, were then and there engaged in interstate commerce, and were subject to the provisions of an Act of Congress known as the Federal Employer's Liability Act, which took effect in April, 1908.

And the plaintiff further alleges that as a result of the said accident, and the careless and negligent acts of the defendant before set forth, and without any fault or neglect on his part, his right leg was cut off; he received a fracture of the left leg and ankle, his back was injured; he suffered and will continue to suffer great pain; has been seriously, painfully and permanently injured in his head, body and limbs; has been crippled for life and prevented from pursuing his business and earning a livelihood; he has been put to much expense for nursing, medicines and medical attendance, artificial limbs and

other necessary appliances, and has been damaged in the sum of Fifty thousand dollars ($50,000.00).

And the plaintiff further alleges that heretofore and before the commencement of this action, he caused to be duly served upon the defendant, a due and sufficient notice in writing, as required by Chapter 600 of the Laws of 1902, a copy of which is hereunto attached and marked "A."

18 Wherefore, plaintiff demands judgment against said defendant in the sum of Fifty thousand dollars ($50,000.00), besides the costs of this action.

HAMILTON WARD,
Attorney for Plaintiff.

Office and Postoffice Address, 104 Erie County Savings Bank Bldg., Buffalo, N. Y.

To the New York Central and Hudson River Railroad Company:

Take notice:

The undersigned has a claim and cause of action against you, and hereby notifies you thereof, in accordance with Chapter 600 of the Laws of 1902. He was injured while in your employ on the 12th day of October, 1908, at North Buffalo Junction in the City of Buffalo, N. Y.; that the cause of his injury was a collision which occurred between engine No. 2499 belonging to you, operated by him, and Michigan Central engine No. 7916 and New York Central engine No. 3784; that such collision was brought about through your negligence and carelessness and the negligence and carelessness of your employees in failing to provide proper rules and regulations for the operation of your trains, cars, switches and signals, and in failing to properly operate the signals, lights and switch towers at

19 the point of the accident, and in failing to provide the undersigned with competent fellow servants, and failing to warn him as he approached the said point of collision of the dangers then and there existing, and that such collision was further due to your failure to provide the undersigned with a safe and suitable engine, and to the fact that the engine operated by the undersigned was defective and unsafe, and leaked steam, so as to obscure the vision of the undersigned, and to prevent him from operating the same in a safe and proper manner.

Dated, February 6th, 1909.

JOHN W. KINNEY.

STATE OF NEW YORK,
County of Erie,
City of Buffalo, ss:

John W. Kinney, being duly sworn, deposes and says that he is plaintiff in this action; that he has read the foregoing complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged upon

information and belief and as to those matters, he believes it to be true.

JOHN W. KINNEY.

Sworn to before me this 24th day of June, 1909.

MARY F. McGOVERN,
Commissioner of Deeds in and for the City of Buffalo, N. Y.

20 STATE OF NEW YORK,
County of Niagara,
City of Lockport, ss:

John W. Kinney, being duly sworn, deposes and says that he is plaintiff in this action; that he has read the foregoing amended complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

JOHN W. KINNEY.

Sworn to before me this 8th day of March, 1916.

GEORGE W. RILEY,
Notary Public.

21 *Answer.*

Supreme Curt, Erie County.

JOHN W. KINNEY, Plaintiff,

against

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Defendant.

The defendant, The New York Central and Hudson River Railroad Company answering the complaint of the plaintiff in the above entitled action:

1. This defendant admits the allegations of the complaint contained in the paragraphs or sub-divisions thereof numbered, "First," "Second" and "Third."

2. This defendant denies that it has any knowledge or information sufficient to form a belief as to the allegations of the complaint, and each and every of them, not hereinbefore controverted or admitted, except that this defendant admits that on the 12th day of October, 1908 a collision occurred between a locomotive of this defendant, on which plaintiff was engineer, and a train of the defendant, The Michigan Central Railroad Company, near Hertel Avenue, City of Buffalo, N. Y., and that as a result thereof, plaintiff sustained certain

injuries as to the nature, extent or result of which, this de-
22 fendant denies that it has any knowledge or information sufficient to form a belief, but this defendant denies that said collision occurred and that the injuries to plaintiff were sustained by reason of negligence on the part of this defendant in the complaint alleged, or by reason of any negligence on the part of this defendant, and denies the allegations of negligence, and each and every of them, on the part of this defendant in said complaint contained.

Second.

For a second, separate and distinct defence to the alleged cause of action in the complaint set forth, this defendant further avers and alleges that the said accident to the plaintiff occurred, and the injuries to him were sustained by reason of his own negligence, and that if any negligence other than that of the plaintiff caused, or contributed to cause, said accident and injuries, it was the negligence of a competent fellow servant, or of competent fellow servants of the plaintiff.

Third.

For a third, separate and distinct defence to the alleged cause of action in the complaint set forth, this defendant further avers and alleges that the said accident to the plaintiff occurred, and the injuries to him were sustained while he was in the employment of this defendant as a locomotive engineer; that said employment was
23 at the time plaintiff entered the employment of this defendant, and continued to be, an obviously dangerous one, the risks incident to which were, and continued to be obvious and well known, and were obvious and well known to the plaintiff, and assumed by him, at the time he entered said employment, and obvious and well known to him, and assumed by him, during the entire time of his continuance in said employment, and that the accident and injuries complained of arose from and were risks incident to said employment, which risks the plaintiff took and assumed at the time he entered, and during his continuance in said employment.

Wherefore, this defendant demands that the complaint be dismissed, with costs.

ALEXANDER S. LYMAN,
Attorney for Defendant The New York Central and Hudson River Railroad Company.

Office & Post Office Address, Room 417 Grand Central Station, Borough of Manhattan, New York City.

STATE OF NEW YORK,
County of New York, ss:

Edward L. Rossiter, being duly sworn, says, that he is an officer of
24 The New York Central and Hudson River Railroad Company, the defendant above named, to-wit the Treasurer thereof; that the foregoing answer is true to his own knowledge, except as

to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

E. L. ROSSITER.

Sworn to before me this 4th day of August, 1909.

GEO. T. BROWN,
Notary Public, Westchester County.

Certified Filed in N. Y. County.

Amended Answer to Amended Complaint.

Supreme Court, Erie County.

JOHN W. KINNEY, Plaintiff,

against

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Defendant.

The defendant, The New York Central and Hudson River Railroad Company, for its amended answer to the plaintiff's amended complaint in the above-entitled action, alleges as follows:

25 First. This defendant admits the allegations of the complaint contained in the paragraphs or subdivisions thereof numbered "First" and "Second."

Second. This defendant denies that it has any knowledge or information sufficient to form a belief as to the allegations of the complaint, and each and every of them not hereinbefore controverted or admitted, except that this defendant admits that on the 12th day of October, 1908, a collision occurred between a locomotive of this defendant on which plaintiff was engineer, and a train of the Michigan Central Railroad Company, near Hertel Avenue, City of Buffalo, New York, and that as a result thereof plaintiff sustained certain injuries as to the nature, extent or result of which this defendant denies that it has any knowledge or information sufficient to form a belief, but this defendant denies that said collision occurred, and that the injuries to the plaintiff were sustained by reason of negligence on the part of the defendant herein alleged, or by reason of any negligence on the part of this defendant, and denies the allegations of negligence, and each and every of them on the part of this defendant in said complaint contained, and further denies upon information and belief, that the plaintiff and defendant at the time of said accident, or at the time mentioned in the complaint herein, were engaged in interstate commerce, or were subject to the provisions of an act of Congress known as the Federal Employers' Liability Act of 1908.

26 Second.

For a second, separate and distinct defense to the alleged cause of action in the complaint set forth, this defendant further avers and alleges:

That the original action was commenced by the service of a summons and complaint on the 30th day of June, 1909, setting forth a cause of action under the New York State Employers' Liability Act and that issue was joined by service of the defendant's answer on August 4th, 1909; that reference is hereby made to such complaint as a part hereof; that recovery was sought under said Employers' Liability Act exclusively and that the case was tried three times upon this sole cause of action; that after the judgment entered upon the verdict rendered upon the third trial in October, 1912, had been reversed by the Court of Appeals, the plaintiff herein served an amended complaint on the 7th day of December, 1916, in which a new cause of action is set forth for the first time under the Federal Employers' Liability Act by the amendment to the original complaint, wherein the plaintiff alleges, upon information and belief, that both the plaintiff and defendant, at the time and in the manner set forth in the complaint, were then and there engaged in interstate commerce and were subject to the provisions of an act of Congress known as The Employers' Liability Act, which took effect in April, 1908.

27 The defendant further alleges that the accident upon which the original cause of action was based, occurred on the 12th day of October, 1908; that the cause of action under the Federal Employers' Liability Act was not pleaded or commenced until the service of the amended complaint on the 7th day of December, 1916, more than eight years after the date of the accident, and that said cause of action under the Federal Employers' Liability Act as set forth by said amendment, is barred by the Statute of Limitations contained in said Act, which provides that no action shall be maintained under said Act unless commenced within two years from the day the cause of action accrued.

The defendant further alleges:

That the plaintiff ought not to have or to maintain this action because the same was not brought or maintained under said Employers' Liability Act, passed by the Congress of the United States, and which was approved April 22nd, 1908, because the same was not brought or instituted thereunder within two years from the time that said alleged cause of action accrued thereunder.

Third.

For a third, separate and distinct defense to the alleged cause of action in the complaint set forth, this defendant further avers and alleges that the said accident to the plaintiff occurred, and the injuries to him were sustained by reason of his own negligence,

and that if any negligence other than that of the plaintiff
28 caused or contributed to cause said accident and injury, it was the negligence of a competent fellow servant or of competent fellow servants of the plaintiff.

Fourth.

For a fourth separate and distinct defense to the alleged cause of action in the complaint set forth, this defendant further avers and alleges that said accident to the plaintiff occurred, and the injuries to him were sustained while he was in the employment of this defendant as a locomotive engineer; that said employment was at the time plaintiff entered the employment of this defendant and continued to be an obviously dangerous one, the risks incident to which were and continued to be obvious and well known, and were obvious and well known to the plaintiff and assumed by him at the time he entered said employment, and obvious and well known to him and assumed by him during the entire time of his continuance in said employment, and that plaintiff's injuries complained of arose from and were risks incident to said employment, which risks plaintiff took and assumed at the time he entered and during his continuance in said employment.

Wherefore this defendant demands that the amended complaint be dismissed with costs.

HOYT & SPRATT,
Attorneys for Defendant, New York Central and Hudson River Railroad Company.

802-826 Fidelity Building, Buffalo, N. Y.

29 STATE OF NEW YORK,
County of Erie,
City of Buffalo, ss:

Maurice C. Spratt, being duly sworn, deposes and says: That he was a member of the firm of Hoyt & Spratt, and is one of the attorneys for the defendant in the above entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

That the reason this verification is made by deponent and not by the defendant is that the defendant is a corporation and not within the county where deponent resides and has his office, and none of its officers reside or are within the county where deponent resides and has his office and capable of making this affidavit.

That the sources of deponent's knowledge and the grounds of his belief are from correspondence had with defendant and correspondence and conversations had with the officers and representatives of the defendant, and from reports of investigations of the defendant's agents, which correspondence and reports are now in deponent's possession.

M. C. SPRATT.

Subscribed and sworn to before me this 22nd day of February, 1917.

JAMES E. KELLY,
Notary Public, Erie County, N. Y.

30 *Order Substituting Attorneys.*

At a Special Term of the Supreme Court Held in and for the County of Erie, at the Court House, in the City of Buffalo, N. Y., on the 8th Day of September, 1909.

Present: Hon. Chas. H. Brown, Justice.

Supreme Court, Erie County.

JOHN W. KINNEY, Plaintiff,

against

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Defendant.

In reading and filing the consent below written and on motion of Hoyt & Spratt, it is

Ordered, that Hoyt & Spratt be, and they hereby are, substituted as attorney- for the defendant, The New York Central and Hudson River Railroad Company, in the above entitled action in place and stead of Alex. S. Lyman.

Granted September 8th, 1909.

P. E. WURST,
Special Deputy Clerk.

31 *Consent.*

It is hereby consented that Hoyt & Spratt be substituted as attorneys for the defendant, The New York Central and Hudson River Railroad Company, in the above entitled action, in place and stead of Alex. S. Lyman.

Dated, New York, September 1st, 1909.

ALEX. S. LYMAN,
Defendant's Attorney.
THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
By L. BENDER,
Treasurer.

STATE OF NEW YORK,
County of New York, ss:

On this 1st day of September, 1909, before me personally appeared L. Bender, to me personally known and known to me to be the Assistant Treasurer of The New York Central and Hudson River

Railroad Company, the corporation described in and which executed the foregoing consent, who, being by me duly sworn, did depose and say that he is the Assistant Treasurer of The New York Central and Hudson River Railroad Company; that he executed the foregoing consent in behalf of and as the act and deed of said The
32 New York Central and Hudson River Railroad Company, and that he so executed the same by authority of the Board of Directors of said Company.

GEO. T. BROWN,
Notary Public, Westchester County.

Certificate filed in N. Y. County.

Clerk's Minutes.

At a Trial Term of the Supreme Court Held at the City and County Hall, in the City of Buffalo, in and for the County of Erie, on the 27th Day of January, 1919.

Present:

Hon. Herbert P. Bissell,
Justice Presiding.

Harvey D. Forbes,
Stenographer.

JOHN W. KINNEY

against

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

Hamilton Ward.
Hoyt & Spratt.

Jury.

1. Clarence A. Kipp.
2. Frank V. Whiting.
3. Christian M. Miller.
4. John Smith.
33 5. Albert Homberger.
6. John Poore.
7. John E. Frost.
8. John U. Metz.
9. George M. Kirby.
10. Seth B. Abbott.
11. Wilbur L. Curtis.
12. John C. Jacobs.

Counsel for plaintiff opens case to the jury.
Recess to 2 p. m.
Court resumes at 2 p. m.
Counsel for the plaintiff resumes the opening.
Counsel for the defendant opens case to the jury.

Witnesses for plaintiff:

George H. Shultis.
Nicholas W. Mullen.
George F. Doud.
John P. Barry.
John W. Kinney.

Court adjourned to January 28th 1919 at 10 a. m. January 28th 1919. Court convened at 10 a. m.

It is stipulated by and between the attorneys herein that this case may be continued and concluded with eleven jurors because juror No. 11, Wilbur L. Curtis, is ill with influenza.

Witness for plaintiff:

John W. Kinney, continued.

Recess to 2 p. m.
Court resumes at 2 p. m.

Witnesses for plaintiff:

John W. Kinney, continued.
Edward H. Peck.

34 Court adjourned to January 29th 1919 at 10 a. m.
January 29th 1919. Court convened at 10 a. m.

Witnesses for Plaintiff:

Edward H. Peck, continued.
George F. Doud, recalled.
William P. Carroll.

Recess to 2 p. m.
Court resumes at 2 p. m.

Witnesses for plaintiff:

William P. Carroll, continued.
Charles W. Kinne.
John J. Dorgan, (testimony read).
James A. Ross.
John McMurray.
James J. Cunningham.
James M. Gardner, M. D. (testimony read).
Joseph Sullivan, (testimony read).
John W. Kinney, recalled.

Court adjourned to January 30th, 1919 at 10 a. m.
January 30th, 1919. Court convened at 10 a. m.

Witnesses for plaintiff:

John W. Kinney, continued.

Plaintiff rests.

Counsel for the defendant moves for a non-suit.
Motion denied.

Witnesses for defense:

William N. Reithenburg.

Recess to 2 p. m.
35 Court resumes at 2 p. m.
Court adjourned to February 3rd, 1919 at 10 a. m.
February 3rd, 1919. Court convened at 10 a. m.

Witnesses for defense:

William N. Reithenburg, continued.

Recess to 2 p. m.
Court resumes at 2 p. m.

Witnesses for defense:

William N. Reithenburg, continued.
Charles L. Mattern.
John J. Mullen.
Robert J. Boyle.

Court adjourned to February 4th 1919 at 10 a. m.
February 4th, 1919. Court convened at 10 a. m.

Witnesses for defense:

Robert J. Boyle, continued.
Jacob P. Keck.
William C. Goulding.
Edwin R. Sayer, (testimony read).
Stephen E. Quinlan, (testimony read).
Russell F. Oakes, (testimony read).
Frank M. Doran, (testimony read).
John H. McCarthy, (testimony read).
A. G. Hawn, (testimony read).
John A. Mansfield, (testimony read).
Patrick A. Clifford, (testimony read).
Anthony Schwartz.

Recess to 2 p. m.
36 Court resumes at 2 p. m.

Witnesses for defense:

Otto Krieger.
William P. Carroll, recalled (testimony read).
William H. Marcy, M. D. (testimony read).
Herbert L. Bronson.
Frederick Hart Livingston, (testimony read).
John T. Allen.
Harry E. Arnold.
Walter Newman.
James E. Brodie.
Samuel Mann, (testimony read).

Court adjourned to February 5th, 1919 at 10 a. m.
February 5th, 1919. Court convened at 10 a. m.

Witnesses for defense:

James J. Cunningham, (testimony read).
Samuel Mann, (Re-direct testimony read).
William E. Dehn.

Recess to 11:15 a. m.
Court resumes at 11:15 a. m.

Witnesses for defense:

William E. Dehn, continued.
William W. Kells.
Frank M. Craven.

Recess to 2 p. m.
Court resumes at 2 p. m.

Witnesses for defense:

Harvey J. Lester.

Defendant rests.

37 Witnesses for plaintiff on rebuttal:

Maurice C. Spratt.
Hugh Rourke.
David William Goodfellow.
Thomas D. Powell.
Edmund T. Johnson.
David William Goodfellow, recalled.
George F. Doud, recalled.
John M. Freeman.
Plaintiff rests.
Evidence closed.
Counsel for the defendant moves for a direction of a verdict of no cause of action.
Motion denied.

Court adjourned to February 6th, 1919, at 10 a. m.
February 6th, 1919. Court convened at 10 a. m.
Counsel for defendant sums up.
Recess to 2 p. m.
Court resumes at 2 p. m.
Counsel for the plaintiff sums up.
Court adjourned to February 7th, 1919, at 10 a. m.
February 7th, 1919. Court convened at 10 a. m.
Court charges the jury who retire in custody of sworn officers of the court to deliberate upon their verdict.
Recess to 2 p. m.
Court resumes at 4:10 p. m.
The jury returns into the court room at 4:12 p. m. for further instructions and after receiving the desired information from
38 the court again retire to deliberate upon their verdict.

The jury again return into court at 4:48 p. m. and say they find a verdict in favor of John W. Kinney under the Federal Employers' Liability Act and fix the total amount due at $40,000.00 and say they find Mr. Kinney guilty of contributory negligence and fix the amount of such negligence at $8,000.00. Deducting this sum from the total they fix the net amount due Mr. Kinney from the New York Central and Hudson River Railroad Company at Thirty-two thousand dollars ($32,000.00).

Special Finding.

Question to be answered yes or no by the jury.
Were the plaintiff and defendant engaged in Interstate Commerce at the time of the occurrence of the accident? Answer. Yes.

FRANK V. WHITING.
JOHN C. JACOB.
JOHN E. FROST.
GEORGE M. KIRBY.
CLARENCE A. KIPP.
SETH B. ABBOTT.
ALBERT HOMBERGER.
JOHN SMITH.
CHRISTIAN MILLER.
JOHN POORE.
JOHN U. METZ.

Counsel for the defendant reserves right to make a motion.
39 All motions held by the court until Monday morning February 10th, 1919 at 10 o'clock.
February 10th, 1919.—The defendant moves for a new trial:

Upon all the grounds stated in Section 999 of the Code of Civil Procedure, except upon the ground that the verdict is for insufficient damages.

Upon the ground that the verdict is contrary to law and contrary to the evidence.

Upon the ground that there is no evidence in the case from which the jury could find that the plaintiff at the time of the accident was engaged in interstate commerce, and in any event that the finding of the jury that the plaintiff was engaged in interstate commerce is contrary to and against the weight of evidence.

Upon the ground that the amendment to the complaint setting up interstate commerce and demanding relief under the Federal Employers' Liability Act set up a new and additional cause of action, which was barred by the Statute of Limitation expressly provided in said Federal Employers' Liability Act, and which was set up as a defense in the amended answer.

Upon all the exceptions taken by the defendant at the trial upon the further ground that the plaintiff was guilty of negligence
40 which was the sole proximate cause of the accident and that the defendant was not shown guilty of any actionable negligence.

That the verdict is excessive.

February 12th, 1919.—Motion denied.

Counsel for the plaintiff moves for an extra allowance of costs in addition to the usual costs.

Motion granted that the plaintiff have an additional allowance of five per cent on the verdict of the Thirty-two thousand dollars in addition to the usual costs of the action, and that judgment be entered accordingly.

I hereby certify that the foregoing is a true copy of the Clerk's minutes in the above entitled action.

RUSSELL B. CLARK,
Special Deputy Clerk,
Erie County, N. Y.

41 *Judgment and Notice of Entry.*

Supreme Court, Erie County.

JOHN W. KINNEY, Plaintiff,

VS.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Defendant.

The above entitled action having come on for trial in Part VI of this court, before the Hon. Herbert P. Bissell, Justice, and a jury, on the 27th day of January, 1919, and said jury having on the 7th day of February, 1919, rendered a verdict in which they said they find a verdict in favor of the plaintiff for the sum of Forty thousand dollars ($40,000.00) under the Federal Employer's Liability Act, and that they find the plaintiff guilty of contributory negligence, and fix the amount of such negligence at Eight thousand

dollars ($8,000.00), and deducting this sum from the total amount they fix the amount due the plaintiff from the New York Central Railroad Company at the sum of Thirty-two thousand dollars ($32,000.00), and said verdict so rendered by said jury having been duly reported to the court, and entered in the minutes of the clerk thereof, it is hereby

Adjudged, that the plaintiff recover of the defendant the
42 sum of Thirty-two thousand dollars ($32,000.00) so found by said jury, together with the sum of Three Thousand eight hundred fifty-three and 99/100 dollars ($3,853.99), costs and disbursements, amounting in all to the sum of Thirty-five thousand, eight hundred fifty-three and 99/100 dollars, and that plaintiff have execution against defendant therefor.

Judgment signed this 19th day of April, 1919.

EDWARD J. CLARK,
Special Deputy Clerk.

SIR:

Please take notice that a judgment of which the within is a true copy was this day entered in the within entitled action in the office of the Clerk of Erie County, at Buffalo, N. Y.

Dated, Buffalo, N. Y., April 19th, 1919.

Yours, etc.,

HAMILTON WARD,
Attorney for Plaintiff.

Office and Post Office Address, Rooms 104-106-109 Erie County Savings Bank Building, Buffalo, N. Y.

To Maurice C. Spratt, Attorney for Defendant.

43 *Order Denying Motion for New Trial and Notice of Entry.*

Supreme Court, Erie County.

JOHN W. KINNEY, Plaintiff,

VS.

THE NEW YORK CENTRAL RAILROAD COMPANY, Defendant.

The above entitled action having come on for trial before Hon. Herbert P. Bissell, Justice, and a jury, in Part VI of the Erie County Supreme Court, on the 7th day of February, 1919, and a verdict having been rendered in favor of the plaintiff and against the defendant for the sum of Thirty-two thousand dollars ($32,000.00), and the court having entertained a motion by the defendant on that day for a new trial, on all the grounds specified in Section 999 of the Code of Civil Procedure, except that the verdict was inadequate, and upon all the exceptions, and upon the Judge's minutes, and after hearing Maurice C. Spratt, Esq., Attorney for the defendant, and Hamilton Ward, Esq., Attorney for the plaintiff, and due deliberation having been had thereon, it is hereby

Ordered, that the motion for a new trial be, and the same is hereby denied.

HERBERT P. BISSELL,
Justice Supreme Court.

Entered February 13th, 1919.
RUSSELL B. CLARK,
Special Deputy Clerk.

44 SIR:

Please take notice that an order of which the within is a true copy was this day entered in the within entitled action in the office of the Clerk of Erie County, at Buffalo, N. Y.

Dated, Buffalo, N. Y., February 13, 1919.

Yours, etc.,
HAMILTON WARD,
Attorney for Plaintiff.

Office and Post Office Address, Rooms 104-106-109 Erie County Savings Bank Building, Buffalo, N. Y.

To Locke, Babcock, Spratt & Hollister, Attorneys for Defendant.

Case and Exceptions.

Supreme Court, Erie County.

JOHN W. KINNEY, Plaintiff,

vs.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Defendant.

The trial of the above entitled cause, before Hon. Herbert
45 P. Bissell, Justice, presiding, and a jury, was commenced in Part VI, City and County Hall, Buffalo, New York, Monday, January 27th, 1919, at 10 o'clock a. m.

Appearances:

For the plaintiff, Hamilton Ward, Esq.; William J. Flynn, Esq., of counsel.

For the defendant, Hoyt & Spratt; Maurice C. Spratt, Esq., Herbert W. Huntington, Esq., of counsel.

(The examination of jurors was commenced.)

Mr. Ward: I challenge Mr. John A. Lower under Section 1180 of the Code.

The Court: Mr. John A. Lower states that he is a broker in casualty and accident insurance as well as other kinds of insurance, and I hold that under the provisions of Section 1180 of the Code of Civil Procedure, which allows a challenge to the favor as to a juror who is in any manner interested in any insurance company

issuing policies for protection against liability for damages for injury to person or property, that that shall be a good challenge, and therefore I hold that that is a good challenge in this case, and I have excused the juror, and give an exception to the defendant.

Mr. Spratt: Yes.

(The jury was duly empanneled.)

(Opening statement to the jury commenced by Mr. Ward.)

Recess until 2 o'clock p. m.

After recess, 2 o'clock p. m.

(Mr. Ward resumed and concluded his opening statement.)

46 (Mr. Spratt made his opening statement to the jury.)

GEORGE H. SHULTIS was duly sworn as a witness in behalf of the plaintiff:

Direct examination.

By Mr. Ward:

Q. Mr. Shultis, what is your business?

A. Conductor on the Michigan Central.

Q. The Michigan Central is a railroad that runs through Canada from the International Bridge to the west, is it not?

A. Yes, sir.

Q. And there is a bridge maintained across the Niagara river which carries the Michigan Central and Grand Trunk business across to Buffalo?

A. Yes, sir.

Q. And carries the Buffalo business across to those roads?

A. Yes, sir.

Q. You have been with the Michigan Central for how many years?

A. 17 years.

Q. In what capacity?

A. I started braking, and then conductor and yardmaster, and now back to conductor again.

Q. During all that time have you been familiar with the Black Rock yards and the track layout there?

A. Yes, sir.

Q. I call your attention to this map on the board. Are you familiar with that territory?

47 A. Yes.

Mr. Ward: I will offer the map in evidence.

The Court: Received without objection and will be marked.

(Map received in evidence and marked Exhibit "1").

(Short recess taken).

Q. I think you told me just before the recess that you had been working with the Michigan Central for how many years?

A. 17 years.

Q. And in various capacities as a conductor and yardmaster and brakeman, and so on?

A. Yes, sir.

Q. Are you familiar with this territory covered by this map Exhibit No. 1?

A. Yes.

Q. That is about how far from the International bridge?

A. About a half a mile, I should judge.

Q. Is there a large freight movement across the International bridge in both directions?

A. Yes.

Q. And both the Grand Trunk and the Michigan Central use that bridge?

A. Yes, sir.

Q. And your work is in connection with the cars that the Michigan Central sends over to the American railroads and the American railroads send to the Michigan Central?

A. Yes.

Q. That has been your business?

A. Yes.

48 Q. And your work as a yardmaster had to do with that business?

A. Yes.

Q. In 1908 what were you?

A. Yard conductor.

Q. Were there some tracks down in the vicinity of these tracks shown on this Exhibit 1 and parallel in a general way with the belt line tracks which are not shown on this map?

A. I think there is a coal branch, fence and middle, from Parish street to Military road.

Q. From Parish street to Military road?

A. Yes, sir.

Q. Where is Parish street in reference to Austin street? Beyond Austin street?

A. I made a mistake. It is Tonawanda street.

Q. And where is Tonawanda street in reference to Austin street?

A. The next street?

Q. The next street south?

A. Yes, up at this end of the tracks (indicating)?

Q. Up at the left of the map (indicating)?

A. Yes.

Q. So that these tracks you speak about, the coal branch, middle and fence track run in a general way parallel with the belt line tracks of the New York Central from Parish street down to Military road?

A. Yes.

Q. And there were three of them?

A. Yes.

49 Q. Did you know what the fence track was used for in October, 1908?

Mr. Spratt: I object to it as incompetent, irrelevant and immaterial. This man was a conductor at that time. And I also object to it as to general use, as not having any specific reference to this specific string of cars on this particular night which it was claimed that Kinney was to handle. The evidence is evidently intended to show interstate commerce, which is incompetent and improper, and barred by the Statute of Limitations.

The Court: That is just a general use of the track at that time. He may answer and give you an exception.

Mr. Spratt: Exception.

Q. What was it used for?

A. It was a delivering track and receiving track for the Michigan Central.

Q. Now, explain that to us a little more fully.

A. That is, I have delivered runs there and I have taken runs off of there to take over the river.

Q. That is, cars that came from Canada?

A. I have left them there.

Q. You put them there.

A. Yes.

Q. And cars destined for Canada you have got from there?

A. Yes.

Q. About how frequently did your duties take you down there to those tracks?

Mr. Spratt: I object to it on the grounds that I urged before, unless confined to the date in question.

50 Q. How frequently did they take you down to those tracks prior to the 12th of October, 1908?

Mr. Spratt: Same objection.

The Court: Same ruling.

Mr. Spratt: Exception.

A. Some days I go in maybe twice a day, and sometimes I wouldn't go in for two or three days.

Q. Were those tracks to your knowledge in 1908 and prior thereto used for any other purpose than for the interchange between the Michigan Central and the New York Central?

Mr. Spratt: That I object to on the same grounds I urged before and on the ground that it is clear that at the time he wasn't there, and couldn't tell what use they were put to.

The Court: That is you object to the general form of the question as a conclusion?

Mr. Spratt: Yes.

Mr. Ward: I said to his knowledge.

Mr. Spratt: Then I object on the same grounds I urged before.

The Court: Same ruling.

Mr. Spratt: Exception.

(Question read.)

A. I couldn't tell you.
The Court: You don't know?
A. I don't know.
Q. I say to your knowledge. Do you know of any other business being done there except the interchange business?
A. No, I don't.
51 Q. You were there sometimes two or three times a day?
A. And sometimes I wasn't there for two or three days.
Q. And your business related to the use of those tracks, did it not?
A. Yes.

Mr. Spratt: I object to it as calling for a conclusion, and exception.
The Court: Same ruling.

Q. These trains that you took down there where did they come from?
A. From Canada.

Mr. Spratt: I object to that on the same grounds I urged before.
The Court: Now, he didn't ask if he knows if the cars came from Canada at that time. Is that it?
Mr. Ward: The trains that he took to that track, I asked him where they came from, and he said they came from Canada.
Mr. Spratt: I object to it and ask that it be stricken out. I objected to it before, and I object to it on the ground unless it is confined to this particular time, and even then it is too remote and outlawed.
The Court. Why outlawed?
Mr. Spratt: He is endeavoring to prove interstate commerce, and he didn't begin his suit in time, within the two years prescribed.
The Court: That has already been disposed of, that question.
52 Mr. Spratt: Your Honor, he might amend the pleadings but the question itself has not been disposed of.
The Court: But as far as this court and the Appellate Division is concerned it is not outlawed. Therefore I will allow the question.
Mr. Spratt: Exception.

Q. The trains that you got off of that track, where did they go to?
A. I took them to Canada.
Q. All the time that you worked those tracks as conductor and yard master prior to the 12th of October, 1908, did you ever find those tracks used for any other purpose except interchange tracks as you have told us?

Mr. Spratt: I object to it on the same grounds I have already urged.
The Court: Same ruling. I will give you an exception, and I am going to let in anything that he can prove here to show that

those tracks were used in interstate commerce at that time, as applying to this case, and give you an exception.

Mr. Spratt: Exception.

Q. Who maintained those three tracks?

A. The Michigan Central.

Mr. Spratt: I object to that as not the best proof, and I ask that it be stricken out. I object to it as not the best proof, and not competent.

The Court: If he knows he can tell, I should think.

Mr. Spratt: 1908.

53 The Court: This was at the time of the accident, wasn't it?

Mr. Ward: Yes.

Mr. Spratt: He was a conductor at that time.

Mr. Ward: And worked in those yards for years. If anybody would know he would know.

Mr. Spratt: It is entirely different as to who maintains the tracks. The proof was in here at the other trial who maintained them. I object to it as not the best proof, and ask that it be stricken out, so that we may start in there.

The Court: If this man knows I am going to let him tell, and give you an exception.

Mr. Spratt: Exception.

Q. Who maintained the tracks, if you know?

A. The Michigan Central.

Q. At this time, Mr. Shultis, was there the extent of industrial development of that part of the city that there is now?

Mr. Spratt: I object to it as incompetent and immaterial.

The Court: Overruled.

Mr. Spratt: Exception.

Q. Did you understand me?

A. No, I didn't.

Q. In 1908 were there all these factories around Black Rock that there is now?

A. Not along the fence track there wasn't.

Q. And for how long before 1908 had you known of this

54 fence track and the adjoining tracks being used as interchange tracks between the New York Central and the Michigan Central.

Mr. Spratt: Same objection.

The Court: Same ruling.

Mr. Spratt: Exception.

A. All my time.

Q. That took up how long? When did you start there?

A. 17 years ago.

Q. Were there any other interchange tracks except those three between those two railroads?

Mr. Spratt: Same objection.

The Court: Same ruling.
Mr. Spratt: Exception.

A. No, sir.
Q. At that time?
A. No, sir.
Q. And was there a large volume of business transacted daily between those two railroads?

Mr. Spratt: Same objection.
The Court: Same ruling.
Mr. Spratt: Exception.

A. I don't quite understand you.
Q. Was there a large volume of business transacted daily between those two railroads?
A. I couldn't tell you just how much there was. Quite a bit.
Q. About how many cars a day would you fix as your estimate at that time that were exchanged daily between those two railroads?
A. I should judge it might be 100 cars both ways. I judge about that.

55 Q. And every single car that the Michigan Central turned over to the New York Central came from Canada, didn't it?

Mr. Spratt: I object to it on the same grounds, and it is leading.
The Court: It is leading, and for that reason it is objectionable.

Q. Did any car that the Michigan Central turned over to the New York Central come from any other place but Canada?
A. No, sir.
Q. Did any car that the New York Central turned over to the Michigan Central go to any other place but Canada?
A. No. It couldn't go no other place.

Mr. Ward: You may ask.

Cross-examination.

By Mr. Spratt:

Q. You were a conductor for what year?
A. I couldn't tell you just the years I have been conductor.
Q. What year did you commence to work as yard superintendent there?
A. Yard superintendent?
Q. What was your title?
A. Yard master. I was general yard master there about four years ago, four or five years ago, I was general yard master, but I have been assistant yard master off and on for the last ten or twelve years.
Q. In 1908 you were conductor, were you?
A. Yes, sir.
Q. And had nothing to do with the yards except as going in there as conductor with your trains and taking out your trains?

56 A. I was conductor at that time, a steady job, but I was yard master off and on.

Q. Were you yard master off and on before 1908?

A. Yes.

Q. What year were you yard master?

A. I couldn't tell you the years, but I was there before that I know.

Q. Where was your run in 1908, October? Where did you go?

A. I run from Victoria yards to Black Rock.

Q. And sometimes you went in on this track a couple of times a day, and sometimes you didn't go on there for two or three days?

A. Yes, sir.

Q. Those tracks were on the New York Central property at that time?

A. Yes.

Q. And the repairs were done by New York Central men, weren't they?

A. Yes.

Q. And the Michigan Central paid a proportionate part in accordance with the amount of cars it put on those tracks, didn't it?

A. They had to keep up the tracks, yes, sir.

Q. And they paid in proportion to the number of cars that they put on those tracks?

A. No, they paid to keep the track up. I don't know whether they paid for keeping——

Q. Wasn't the percentage 8 or 9 per cent of the total cost of maintaining and keeping up the tracks, the share of the Michigan Central Railroad?

57 A. I couldn't tell you, answer that.

Q. How do you know that the Michigan Central paid for it?

A. I seen the bills.

Q. And what you saw was the proportionate part the Michigan Central was to pay?

A. I have just seen the bills for repairs on the track.

Q. Wasn't it the proportionate part, the share of the Michigan Central?

A. I didn't see that on it.

Q. Where did you get the bills?

A. I seen the bills. The section foreman over there gave them to me. He is the one that gets the bills.

Q. Did you send them on to the Michigan Central?

A. Yes, sent them to St. Thomas.

Q. You don't know personally what the total cost of repairing the tracks was?

A. No, I couldn't tell you that.

Q. All you know is that a certain bill was sent to the Michigan Central for its costs for maintaining those tracks?

A. Yes.

Q. Its charge for maintaining those tracks? The New York Central engines went in on those tracks, did they not?

A. Yes, I have seen them in there.

Q. The New York Central cars went in on those tracks?

A. I couldn't say I ever seen any New York Central there. They might have been.

58 Q. Didn't you ever see a New York Central car in there?

A. Yes, I have seen the initials, sure.

Q. Do you know where you were on October 12th, 1908, the date of this accident?

A. No, sir, I couldn't tell you that.

Q. And you don't know what cars were in on that fence track on that day, do you?

A. No, sir.

Q. So that you have no idea or knowledge whatever as to what cars were in there that it is claimed Mr. Kinney's engine was going to take out at the time of the accident?

A. No, sir.

Q. During the time you weren't there you don't know the origin of the cars that might be on those tracks?

A. No, sir.

Q. Or where they came from or where they were destined to?

A. No, sir.

Q. Or whether they came from Buffalo or Chicago?

A. I couldn't tell you that.

Q. All you know is that you run in there with your train and delivered cars there and took cars off?

A. And took cars off, yes, sir.

Q. And you don't know the destination of the cars at any particular time?

A. We just delivered them to the New York Central at Black Rock. We used to deliver to all the rest of the roads the same way.

Mr. Spratt: That is all.

59 Redirect examination.

By Mr. Ward:

Q. During your seven years there before Mr. Kinney's accident had you ever known those tracks to be used for any other purpose than for the interchange between the New York Central and the Michigan Central?

Mr. Spratt: I object to that. He has already gone over it as part of the direct examination.

The Court: It is a repetition of what he has already gone over. He may say it again.

Q. What was your answer?

Mr. Spratt: Also that it is remote.

A. I don't know.

Q. You said you knew of no other use?

The Court: What was his answer?

A. I don't know. I couldn't tell you. It might have been and might not.

Q. Have you ever known of any other business on those tracks except the interchange business?

Mr. Spratt: I object to that as already answered fully.

A. I don't know. It might have been——

Q. You didn't know of any other business?

A. No.

Mr. Spratt: It may have been used for other purposes?

A. Yes, sir.

Mr. Ward: When he wasn't there, he can't swear to what happened when he wasn't there. He can only tell what he saw.

60 That is all I am pretending to prove by him.

NICHOLAS W. MULLEN was duly sworn as a witness in behalf of the plaintiff.

Direct examination.

By Mr. Ward:

Q. Were you in the Government service in October, 1908?

A. I was.

Q. Where were you stationed?

A. At the sub-port of North Buffalo.

Q. That means the International Bridge and custom house there?

A. Yes.

Q. Are you familiar with the volume of traffic that was passing over the International Bridge in both directions at that time?

A. Yes.

Mr. Spratt: I object to it as incompetent, irrelevant and immaterial.

The Court: Same ruling.

Mr. Spratt: And on the same grounds I urged to this same line of testimony, and exception.

Q. Can you tell us about what volume of freight movement per day there was across the International Bridge both ways in October, 1908?

Mr. Spratt: Same objection.

61 The Court: Same ruling.

Mr. Spratt: Exception.

A. Yes.

The Court: If he can tell, he is asked.

A. I can because I had occasion to make up a tabulated statement at the time that we, the Government employees, were asking the Collector of Customs for an increase of salary, and to further our base for that claim we made him up a compilated compilation of the business done each way, showing among other things the num-

ber of cars coming in, and the number of cars going out, and I made that up.

Q. What was the volume of that business then?

Mr. Spratt: Same objection.
The Court: Same ruling.
Mr. Spratt: Exception.

A. My recollection now is that the number of cars coming in was slightly in excess of a thousand a day.
Q. Coming in?
A. Coming in, yes.
Q. And how many going out?
A. 1,100 to 1,200.
Q. Do you know about what proportion of that were Michigan Central cars, Michigan Central business?
A. About a third, or thirty per cent.
Q. About a third of that was Michigan Central business?
A. Yes.

Mr. Ward: That is all.
Mr. Spratt: Nothing.

62 GEORGE F. DOUD, was duly sworn as a witness in behalf of the plaintiff:

Direct examination.

By Mr. Ward:

Q. You worked for the New York Central for a good many years, did you not?
A. For nearly 20.
Q. Are you familiar with the situation shown in the map there, Exhibit No. 1?
A. Yes, sir.
Q. When did you first go to work for them?
A. For the New York Central?
Q. Yes.
A. September 15th, 1897.
Q. You left them when?
A. December 8th, 1916.
Q. What lines of work had you done from the time you first went to work there until October 12th, 1908?
A. Do you mean from my starting point?
Q. Yes.
A. I started for the New York Central as a flagman, promoted to a switchtender, from switchtender to yard brakeman, from yard-brakeman to yard conductor, and from yard conductor to yard master.
Q. During the time that you were yardmaster did you have charge of this section of the yard shown in the map?

A. At one time, yes, sir.
Q. Do you remember when that was?
A. In 1907.
63 Q. What were you doing in 1908?
A. Yard conductor.
Q. And as yard conductor were you running in and out of that yard?
A. Yes, this part of the yard (indicating).
Q. You indicate the part of the yard referring to the belt line tracks?
A. Yes, sir, from East Buffalo to Black Rock.
Q. In 1908 were the yards the same and the use of the tracks the same as they were when you were yard master the year before?
A. Practically.
Q. Were you familiar with three tracks not shown on this map which ran from Tonawanda street down to Military Road, and parallel with the belt line tracks? Are you familiar with those tracks?

Mr. Spratt: I object to it as incompetent, improper, and prior to this accident, and remote, and also outlawed.
The Court: I have already allowed that, so that I will simply repeat the ruling I have already made.
Mr. Spratt: Exception.

A. Tower B here (indicating). They call it Tower B. These tracks went from Tower B connecting with the main tracks at that point (indicating), and running parallel with the main tracks, the Falls road tracks through Tower H, and Tower H, to the Military Road.
Q. During the time you were yardmaster there in charge of those yards, and from that time on down to the time of this accident in October, 1908, what were those tracks used for?

64 Mr. Spratt: Same objection.
The Court: Same ruling.
Mr. Spratt: Exception.

A. Coal branch and the middle—that is from the main track—coal branch first and then the middle was used for Michigan Central business going to the Michigan Central, and the fence track was used for business coming from the Michigan Central.
Q. Were those tracks used exclusively for that purpose or not?

Mr. Spratt: I object to that on the same grounds.
The Court: Same ruling.
Mr. Spratt: Exception.

A. There wasn't any other tracks to use.

Mr. Spratt: I ask that that be stricken out.

A. And it was necessary to use those.

Mr. Spratt: I ask that that be stricken out.

The Court: I will strike that out.

Q. Were they used exclusively?

Mr. Spratt: I object to it. He wasn't there all the time.
Mr. Ward: He was yardmaster.
Mr. Spratt: He wasn't there in 1908.
Mr. Ward: Running in there in 1908.
The Court: You may answer.

Q. During that time that you have testified to were those tracks used exclusively for the purpose you have told us?
A. I don't know how I am going to answer that question and keep out of trouble.
65 Q. Do you know what I mean by exclusively? Were they used for anything else?
A. I don't think so. I am sure of that. No, wait a minute, hold on. I am sure there wasn't any other business transacted on those three tracks except for the business, Michigan Central business.
Q. Were there any other interchange tracks between the Michigan Central and the New York Central there except those three tracks?
A. No interchange tracks, no, but there was two other short tracks.
Q. At that time was there any such volume of industrial business in the Black Rock section as there is today?

Mr. Spratt: Same objection.
The Court: Same ruling.
Mr. Spratt: Exception.

Q. In 1907 and 1908?

Mr. Spratt: It is wholly incompetent what is there today, ten or twelve years after.
The Court: He is trying to show the situation as it was then, as I understand it. That is all he is asking about.

Q. Your answer is what?
A. The industrial plants were small, and the volume of business, it is safe to say, wasn't forty per cent of what it is at the present writing.
Q. Where were the industrial switches for that section at that time, local freight that arose in the various plants? Where did they put them?
A. Well, there was three tracks. One they called the scale track, and one they called number one, and one they called num-
66 ber two located towards the Grand Trunk yard, that is towards that subway, and in between the main track and the Grand Trunk yard. Those three tracks hold about 20 or 22 cars apiece.
Q. About how many trains would come in onto those tracks for the Michigan Central every day?
A. I can't answer that question only during my time as yardmaster there, Mr. Ward.
Q. During that time how many?

A. In 1907 there was quite a little business for Canadian points, and they held cars at that time until the Grand Trunk and the Michigan Central could accept them, and as fast as the Michigan Central and the Grand Trunk could handle their freight they were sent over here in bunches, so that they could be got over the customs, and brought over the bridge in 25 car lots as fast as they had room to yard them.

Q. Were those cars which were sent over to the Michigan Central, were there any other tracks destined or consigned or appointed for their use except these three tracks?

Mr. Spratt: I object to it as repetition and on all the grounds I have mentioned before.

The Court: Same ruling.

Mr. Spratt: Exception.

Q. You may answer.

A. There was no other tracks.

Q. During the entire time that you were there, Mr. Doud, up to 1908 at the time of this accident—I can't ask you about since, but up to the time of this accident did you know those three tracks
67 to be used for any other purpose except for interchange tracks between the Michigan Central and the New York Central?

Mr. Spratt: I object to it on the same grounds I urged before.

The Court: Same ruling. He may answer.

Mr. Spratt: I also showed that prior to 1908 he wasn't there. The accident happened in 1908 and he wasn't there at the time of the accident.

Mr. Ward: He says he was running into those yards every day as a conductor.

The Court: I understood him to say in 1907 he was a yardmaster and then the next year a yard conductor.

Mr. Spratt: Running in and out; not there all the time.

The Court: Now he is asked what he knows about their use at that time.

(Question Read.)

A. There was no other use that I know of.

Mr. Spratt: Exception.

The Court: Yes, exception to the defendant.

Mr. Ward: That is all for the present from Mr. Doud. Mr. Doud is a witness on another subject, but I don't want to go into that now.

Cross-examination.

By Mr. Spratt:

Q. You were yardmaster there in 1907?

A. Yes.

Q. What time did you quit being yardmaster?

68 A. Well, I haven't got the date on that.

Q. Was it in the year 1907?

A. I am quite sure that it was along toward the latter part of 1907.

Q. And then after that what did you do from that time, during the year 1908?

A. I still worked for the New York Central as yard conductor. That is the line of promotion.

Q. What yard were you working in?

A. The transfer yard.

Q. Where was the transfer yard?

A. A man that has charge of a transfer engine he goes wherever he is sent to any one of the yards operated by the New York Central.

Q. How many yards did you operate in?

A. At that time it took in for about a mile east of Broadway and Black Rock, Erie street, Carroll street.

Q. Several hundred miles of track in those yards?

A. Yes.

Q. So that there might be times for several days you wouldn't be in this yard in question where the accident happened?

A. Yes.

Q. There might be sometimes weeks when you wouldn't be there?

A. Possibly.

Q. You don't know what time in October you were there, do you, or whether you were there in October, 1908?

A. I am not sure as to the date, but I was there nearly a year at that point.

69 Q. I meant you don't know whether you were there in the month of October in this yard at all?

A. In Black Rock?

Q. Yes.

A. I couldn't testify to that.

Q. And you don't know what these tracks were used for, or what cars were there on the fence track or these other tracks you have spoken of, October 12th, 1908, do you?

A. No, as a matter of fact I don't, not on those dates. I wasn't sure. I couldn't tell.

Q. So that there might have been either intrastate or interstate cars on those tracks without your knowledge?

A. It could have been possible, yes, sir.

Q. Those were New York Central tracks, were they not?

A. I am not able to qualify as to that.

Q. When you were yardmaster there in 1907 who looked after the tracks?

A. I was working nights. They didn't make no repairs to the tracks at nights.

Q. You were never there in the daytime?

A. Never in authority in the daytime.

Q. You were around there very little in the daytime?

A. Well, I had to sleep.

Q. So that you don't know what company's men repaired those tracks?

A. I don't know anything about the repairs to the tracks. That wasn't my line.

Q. You never knew of any Michigan Central men being over there to make repairs, did you?

A. They don't make repairs at night.

70 Q. You don't know?

A. Well, I will answer that question in that way.

Q. Just answer it my way.

A. Well, I have never seen any.

Q. Do you remember testifying at the last trial here?

A. I have read that testimony.

Q. You read it recently, did you?

A. Yes, sir.

Q. Now, did you testify (page 357) at that time: "The Witness: It does not show it was 1907 that I was yardmaster. If it does it is a mistake, because I remember distinctly saying I was yardmaster at Black Rock in 1907, and in 1908 I was yardmaster at East Buffalo, in the V. I. yard, I think it shows." Didn't you testify at the last trial that in 1908——

A. If that is the way it stands there I must have said it.

Q. If you were yardmaster in the V. I. yards in East Buffalo in 1908 you weren't running in there in this yard, were you?

A. Will you permit me to explain?

Q. Just answer my question.

A. I can't answer your question with proper credit to myself without an explanation.

Q. You just answer my question now.

The Court: You will have an opportunity to explain later. Now just answer his questions. You are under cross examination, and the rule is that the witness must answer the questions as they are put.

71 Q. If you were yardmaster in the V I yards in East Buffalo in 1908, at the same time you weren't running in as yard conductor into these yards in question, were you?

A. It would be quite impossible to do that.

Redirect examination.

By Mr. Ward:

Q. You wanted to make some explanation.

A. I wanted to make this explanation, that after being sent to East Buffalo from Black Rock, that they used me as an extra yardmaster on account of reducing the forces at Black Rock, and that I was yardmaster at this point for a certain length of time, and yardmaster at another point for a certain length of time, and when there wasn't any business for me as yardmaster, which is of course a proper administration, I went back to my seniority rights as a yard conductor.

Q. So that today you might be acting as a yardmaster and tomorrow you might be running a train as a yard conductor?

A. That's the idea.

Mr. Spratt: I object to that as suggestive.
The Court: I think that is in explanation.

A. That's the idea.

The Court: That may stand.

Q. So that while you were acting as a yardmaster over in the East Buffalo yards they would make you a conductor every little while, and then you would run over here?

Mr. Spratt: I object to that as suggestive and leading.

72 Q. Is that correct?
A. No, I have already covered it.

Recross-examination.

By Mr. Spratt:

Q. How did you happen to leave the employ of the New York Central?
A. By interesting myself in my father's case when he lost his leg.
Q. He had a claim against——
A. The claim was settled without going to law.
Q. Against the New York Central?
A. The claim was settled, yes, sir.
Q. So that you left there on account of trouble between your father and the New York Central?
A. There was no trouble.
Q. You left there?
A. I was discharged.
Q. So that you aren't particularly friendly to the New York Central?
A. Nothing. I haven't anything against the New York Central at all. I have been invited to return.

Mr. Ward:

Q. What did they discharge you for?
A. For interesting myself in my father's case when he lost his leg.
Q. What did you have the temerity to do for your father?
A. I employed a photographer and went out and took photographs of the place where he was hurt.
Q. Then you got fired for that?
A. And I got the number of the car, and I was discharged
73 for doing that because I wouldn't surrender the pictures that I had taken.

JOHN P. BARRY was duly sworn as a witness in behalf of the plaintiff:

Direct examination.

By Mr. Ward:

Q. You were a New York Central engineer for a good many years?
A. No, not an engineer.
Q. What were you?
A. Yard brakeman and a switch tender.
Q. And were you familiar with these yards over there around Hertel avenue where Mr. Kinney was hurt?
A. I was.
Q. When did you first commence to work in those yards?
A. Various times from 1901 to 1914.
Q. Were you there in those yards during the years 1907 and 1908?
A. Yes.
Q. In what capacity?
A. Yard brakeman.
Q. The yard brakeman makes up the trains and couples the cars up and so on?
A. Yes.
Q. Are the cars marked in some way?
A. They are.
Q. Chalk marked?
A. Chalk marked and cards.
Q. So that by looking at these marks you can tell where
74 the cars have come from and where they are going to?
A. Where they come from. Sometimes where they are going to.
Q. Were you familiar with those tracks also known as the fence, the middle and the coal track?
A. I was.
Q. Throughout 1907 and 1908 what were those tracks used for?

Mr. Spratt: I object to it on the same ground as urged to this line of testimony.
The Court: Same ruling.
Mr. Spratt: Exception.

A. Interchange of cars, Michigan Central and New York Central.
Q. Were they used for any other purpose that you know of?
A. No, sir.
Q. And during that time was that going on every day, that interchange of cars?
A. It certainly was.

Mr. Spratt: Same objection.
The Court: Same ruling.
Mr. Spratt: Exception.

Q. Were there any other interchange tracks between the New York Central and the Michigan Central?
A. No, sir.
Q. There were some other tracks there for the industrial cars, were there not?
A. Yes, sir.
Q. Local business? Where were those tracks?
A. Down farther between the Grand Trunk track and the Belt Line, alongside the Belt Line.
75 Q. When you have cars originating locally, local business, do you have to weigh them?
A. Sometimes.
Q. Were there scales down where these industrial tracks were?
A. There were.
Q. Were there any scales up here where these interchange tracks were?
A. No, sir.

Mr. Ward: I guess that is all.

Cross-examination.

By Mr. Spratt:

Q. Mr. Barry, are you working for the New York Central now?
A. No, sir.
Q. When did you quit working?
A. 1914.
Q. What was the trouble?
A. Violated a rule.
Q. What was the rule?
A. "G."
Q. What is that?
A. Rule G.
Q. Just tell me what that was.
A. I drank on duty, several of us, and we got discharged for it.
Q. Did you work there during all the year 1907?
A. Not continually.
Q. Off and on?
A. Off and on.
Q. Did you work there all through the year 1908?
A. Not steady.
76 Q. Did you work nights or days?
A. Days and nights. Changed around.
Q. Do you know whether you worked there the date of this accident, October 12th, 1908?
A. I can't remember whether I worked there that day or not?
Q. When you were not there you don't know what use these tracks were put to, do you?
A. What is that?
Q. When you weren't there you don't know what use the fence track and these other tracks were put to, do you?

A. I don't know, only I suppose they were used for the same purpose they always were.

Mr. Spratt: I ask that that be stricken out.
The Court: Strike it out.

Q. Do you know personally, when you weren't there you don't know what use these tracks were put to, do you—the fence track?
A. When I wasn't there I couldn't swear what they were used for.
Q. And you don't know what use the fence track was put to on the evening that Mr. Kinney was injured, do you?
A. No, sir.
Q. You weren't there?
A. I am not sure I wasn't there, but I can't recollect.
Q. And you can't recollect anything about that?
A. I was not interested enough to recollect.
Q. And you don't know what cars were on that track, on the fence track the night of the accident, whether they were interstate or intrastate?
77 A. About that accident?
Q. Yes.
A. No, sir.
Q. I say, you don't know, do you?
A. I don't know.

Mr. Spratt: That is all.
Mr. Ward: That is all.

JOHN W. KINNEY, the plaintiff, was duly sworn as a witness in his own behalf:

Direct examination.

By Mr. Ward:

Q. Mr. Kinney, you are the plaintiff in this suit?
A. Yes, sir.
Q. What is your age?
A. I will be 52 years the first of next month.
Q. Where do you live?
A. I live in the town of Lockport, Niagara County.
Q. What do you do there?
A. I have been farming it.
Q. You started railroading when?
A. I started in railroading September 9th, 1890.
Q. With what railroad?
A. New York Central.
Q. And I suppose you started in as fireman or something?
A. Locomotive fireman.
Q. And did you continue to work for them from that time up to the time that you got hurt?
78 A. Yes, sir.
Q. You were 20 or 21 years old when you started to work for them?

A. I was 23 and a half.
Q. And from that time you did nothing else?
A. Nothing only work for the New York Central.
Q. When did you get to be an engineer?
A. September, 1900.
Q. Then did you continue to be an engineer until the time you were hurt?
A. Yes, sir.
Q. Now, a fireman starts in by being a freight fireman and then he gets to be a passenger fireman? Is that the way it works?
A. Why, he strikes all lines of firing, firing switch engines, freight engines and passenger engines. It all comes within——
Q. Before you got to an engineer had you had all that experience?
A. Yes, sir.
Q. Fired the Empire State, did you?
A. Yes, sir.
Q. For how long?
A. Well, as near as I can remember about two years and nine months.
Q. And from that you were promoted to engineer?
A. Yes, sir.
Q. And then as engineer they start you in, I suppose, with some of the less important things?
A. You being right over the road that you did fireman, only on the hight-hand side of the cab. You are an engineer instead of a fireman.
79 Q. What kind of work did you get to do as engineer?
A. I run switch engines and freight engines, and the like of that.
Q. Had you got to the point where you were running passenger engines yet at the time you were hurt?
A. I had run some passenger——
Q. Some passenger engines?
A. I run some passenger engines and passenger trains.
Q. In 1908 what sort of a run did you have?
A. Why, it was considered a freight run.
Q. Was it a regular run?
A. You wouldn't call it a regular run because it had no regular time for going out.
Q. You lived at that time where?
A. 1812 Bailey avenue.
Q. That was near the roundhouse?
A. It was about ten minutes walk for me at that time from my house to the roundhouse.
Q. When they wanted you they would send a boy over for you?
A. Yes, sir.
Q. Did Mr. Flynn ever come and call you?
A. He has come and called me.
Q. When you would go over to the roundhouse and take an engine would you pick out the engine?
A. No, sir.

Q. Who picked it out for you?
A. I suppose the roundhouse foreman ordered what we call the boss caller to make it up on the blackboard.
80 Q. Did you know where you were going until you got there?
A. Not until I got to the roundhouse.
Q. What was your health before this accident?
A. I considered it pretty good.
Q. Did you have two good legs?
A. Yes, sir.
Q. You had been in no accidents that had lamed you or crippled you in any way?
A. No, sir.
Q. Did you have good general health?
A. Yes, sir.
Q. You were a man about how tall at that time?
A. Well, I should say about 5 foot ten inches.
Q. And you weighed how much?
A. Well, my average weight then would be about 180 to 185 pounds.
Q. What wages were you getting?
A. Well, I couldn't tell just to a cent, but I should estimate that I was getting about $180 a month.
Q. Averaging that?
A. Well, that is what I should estimate it at.
Q. In this business of yours in which you were engaged how is your advancement determined?

Mr. Spratt: I object to it as incompentent and immaterial.
The Court: What is the question?
Mr. Ward: How was his advancement determined in the railroad business.
Mr. Spratt: We have got what he was earning.
The Court: But if there was some method of advancement
81 perhaps it might have some bearing.
Mr. Ward: I have a brief on that subject that I can submit to your Honor.
The Court: I will take it.

Q. How was your advancement determined in the railroad business?
A. The employees have what they call a seniority list.
Q. What does that mean?
A. It means as a man advances in his age and service—I don't mean age in years, but the longer he works for the railroad, and the business increases, the better position he gets when it comes his turn to get that.
Q. Now we will get back to the 12th of October. You were called about what time?
A. I think it was 10:30 at the house.
Q. In the morning?
A. Yes, sir.

Q. You went over to the roundhouse. Tell us what happened over there?

A. And I was called to register at 12:30. That would mean to leave the yard at 1:30. You get two hours call from the house to prepare yourself, and get your lunch, and get to the roundhouse, and then one hour from the time you get to the roundhouse you get your engine in the yard and get started with your train. I arrived at the roundhouse on time and registered. We had to register or did have to at the proper time in the office, and you see on the board what engine you are to get, and as I said before you have an hour
82 to get to the yard, and you have to locate this engine as quickly as possible, and get her ready. So that if you can't see the engine in sight, and you run across anybody you can inquire about where you can look for this engine; and I think it was Mr. Carroll, as I was passing by the office I asked him if he could tell me where to find the engine, and he said "out on the dump pit."

Q. Who was Mr. Carroll?

A. He was day roundhouse foreman at the West Shore roundhouse.

Q. You haven't told us what the number of this engine was yet. You saw this engine checked up there on the board?

A. Yes, sir.

Q. And did it give the name of your fireman?

A. Yes, sir.

Q. What name was that?

A. Harry Sauer.

Q. Is that Mr. Sauer (indicating)?

A. Yes, that is Mr. Sauer.

Q. Mr. Carroll told you would find the engine on the dump pit?

A. And I went out there, and I found it on a track alongside of the dump pit. That is where they back them up, off the dump pit, and run them in on another track outside of the roundhouse, outdoors. And I got on the engine, and put on my overalls, and put my lunch pail in the box, and my coat and hat, and I saw some men working on the engine, and there was no fireman showed up
83 yet, and I went over and got tools, all the tools that I could get that they furnish, and there hadn't any fireman shown up yet, and I grabbed the oil can and went over to draw supplies and inquired of the caller if he had called the fireman. It is practically impossible for one man to get an engine ready and get to the yard—get an engine ready in a half an hour and get to the yard. It takes two men, and it should be there on time. When I went out there there was two machinists that was working on the engine.

Q. What part of the engine?

A. They were working at the left piston rod.

Q. All right. Then what?

A. When I went back after the tools or the oil—I don't remember just which—I inquired of Mr. Carroll if they were going to have their engine ready so as to get to the yard on time, and he said they would. One of my trips—I think it was when I went back after the oil—the men had left the engine, that is, the two machinists, and to

make sure that there was no work on this engine by boiler makers, and what we call pipe men, that, fixing leaks in pipes, or air men, to make sure that there was none of them gangs had any work on this engine, I inquired of Mr. Carroll if that engine was O. K. for service when those two men got through that was working on the piston rod, and he said she was.

Q. Said it was O. K. for service?

A. Yes.

Q. Do you remember his assistant, Mr. Ross?

A. Yes, sir.

Q. Was he standing there when Mr. Carroll told you that?

84 A. Yes, sir.

Q. Did you know anything about that engine at that time?

A. 2499?

Q. Yes. Had you had any previous experience with that engine?

Mr. Spratt: I object to it as incompetent and immaterial.

The Court: I will take it.

Mr. Spratt: Exception.

Q. Did you know anything about that engine at that time, that particular engine?

A. What do you mean? About her condition?

Q. Yes.

A. Why, yes, I knew that she had a leak from the belly of the boiler. That is why I asked Mr. Carroll if there was any other work on it.

Mr. Spratt: I object to that.

Q. How did you know that she had a leak in the belly of the boiler?

A. You could see it.

Q. Mr. Carroll told you she was O. K. for service?

A. Yes, sir. I had no right to take her if he hadn't.

Mr. Spratt: I ask that that part be stricken out.

The Court: I will let it stand.

Mr. Spratt: Exception.

Q. Then what did you do, John?

A. As soon as the fireman come we proceeded to the yard where we was ordered to get our train.

85 Q. Where was that?

A. It was over on the—found the caboose on what they call 20, the caboose track in the north yard. That is where we found our train crew, and when we found the train crew they told us we would get our train from the cripple yard—or I mean the shop yard. The shop yard is over where the main shop is for repairing freight cars.

Q. Then what did you do with your train?

A. It seems to me there was a flanger or two flangers—a flanger and a snow plow, or two flangers—I can't remember just which it

was—and took them to Tonawanda and put them on a track alongside of the Y track.

Q. Did you have a crew go with you?

A. Yes, sir.

Q. Who were those crew?

A. The conductor was Mattern, and one brakeman's name was Boyle and the other was Mullen.

Q. Had you ever traveled with them before?

A. I had worked with Mattern, but I don't recall working with Boyle or Mullen.

Q. Did they seem to be experienced men?

A. Yes, sir.

Q. Going down to Tonawanda did you notice anything about steam leaking from your engine?

A. I noticed—yes, there was steam leaking from her.

Q. Did it obstruct your view of signals?

A. No, sir.

Q. Where was the steam leaking from as you went down to Tonawanda?

86 A. It was leaking from the belly of the boiler, and the left piston rod, and the union, and the steam pipe and injector under the running board of the car, and it was also leaking from the throttles in the cab.

Q. At this time in 1908 were they using road engines in yard service?

Mr. Spratt: I object to it as incompetent, irrelevant and immaterial.

The Court: Same ruling.

Mr. Spratt: Exception.

A. They were when they got in to close service for the main line.

Q. Was this 2449 a road engine or a yard engine?

A. She was a road engine, a big freight engine.

Q. One of the largest type?

A. At that time.

Q. Did you see the report of the engineer who used this engine before you did, before you went out?

A. I have never been able to see any of them.

Mr. Spratt: I ask that that be stricken out.

The Court: Just answer the question. Strike it out.

Q. Did you see that one that day?

A. No, sir.

Q. Did you ask for it?

A. I asked Mr. Carroll if the engine was O. K. for service and he said she was.

Mr. Spratt: I ask that that be stricken out as not responsive.

87 The Court: He has already answered that. He said that, that he asked Mr. Carroll before if it was O. K.

Mr. Spratt: He asked if he saw the report.
The Court: And he said no.

Q. Did you see the report of the previous engineer?
A. No, sir.
Q. And you have never see it since, have you?
A. No, sir.
Q. There was a fire destroyed some New York Central property after the first trial of this case, wasn't there? Did you hear about that?
A. Yes, sir.
Q. Do you recall that we asked for that report before that fire for use on the first trial?

Mr. Spratt: I object to it. If they made a demand that is the proper evidence.
Mr. Ward: I am asking the plaintiff if we made a demand.
The Court: If he know, he may answer.
Mr. Spratt: Exception.

Q. Do you know if that report was demanded of the defendant?
A. I will have to answer it in this way, that you told me——

Mr. Ward: Never mind unless you know.
Mr. Spratt: I ask that it be stricken out.
88 The Court: Strike it out.

Q. That wasn't produced, was it? You have never seen that, that report of Dr. Dargan?
A. No, sir.
Q. Or the report of Mr. Charles Kinney made the day before? You have never seen that, have you?
A. No, sir.
Q. After you had taken this train to Tonawanda what did you do with it? What did you do with the engine?
A. Come back with the caboose.
Q. Then did you get further orders?
A. Yes, sir.
Q. What were those?
A. Got an order to go down in the depot yard and get a coal train for Black Rock.
Q. Did you do that?
A. Yes, sir.
Q. Take the coal train to Black Rock?
A. Yes, sir.
Q. Did the steam interfere with your reading signals on that trip?
A. No, sir.
Q. Then what did you do?
A. Left the coal train at Black Rock on the Southern track, and run down to the water plug and got a tank of water. By that time the conductor come down from the rear end, and he and Mr. Boyle went over to the yard office, and pretty soon Mr. Boyle came out of

the yard office, and got up on the engine and said, "We got a train off from the fence track for East Buffalo."

89 Q. That was to go back where you had come from, was it?

A. Yes, sir.

Q. During your railroad service previous to that, had you been running into that Black Rock yard a good deal?

A. I had been running in there and—yes, running in the yard and running out of there.

Q. Were you acquainted with the use to which the fence, coal and middle tracks were put at that time?

A. Yes, as a switch engineer or a road engineer.

Q. What were those tracks used for at that time?

A. For receiving and delivering cars——

Mr. Spratt: Same objection to this line of testimony that I urged before.

The Court: Same ruling.

Mr. Spratt: Exception.

A. For receiving and delivering cars from the Michigan Central and the Grand Trunk, and from the Canadian roads coming across the International Bridge.

Q. During that time previous to your accident had you ever known of any other business on those tracks except the interchange business from the Canadian roads?

Mr. Spratt: Same objection.

The Court: Same ruling.

Mr. Spratt: Exception.

A. No, sir, I do not.

Q. And how frequently did you visit those tracks to take a train in or take one out?

90 A. Well, sometimes it wasn't very frequently, and I have worked there as high as six weeks steady in the yard on those switch engines, and during my service them tracks was classed for that purpose.

Mr. Spratt: I ask that that latter part be stricken out.

The Court: I will let it stand.

Mr. Spratt: Exception.

The Court: If he knows he may tell what they were used for. You mean classed for this purpose you have stated of interchange across the bridge?

The Witness: Yes.

The Court: That may stand.

Mr. Spratt: It is a conclusion on his part. He can tell what was done.

Q. At that time Hertel avenue crossed the railroad tracks there at grade, did it not?

A. Yes.

Q. Hertel avenue had a trolley track on?

A. Yes, a double trolley track.

Q. When you went to East Buffalo how did you go, down by Tower I here (indicating), out that way, at the bottom of the map?

A. To go from Black Rock to East Buffalo?

Q. Yes.

A. You go from Tower H to Tower I. That is the direction you would go to East Buffalo.

Q. Down toward the bottom of the map? (Indicating.)

A. Yes, sir.

Q. And up this way (indicating), toward the north side
91 of the map, that went toward Niagara Falls?

A. Yes, sir.

Q. And back this way (indicating), to the south side of the map, went toward the International Bridge and downtown?

A. Yes, sir.

Q. The Erie Railroad tracks that are shown on this map (indicating), they didn't have anything to do with this business, did they?

A. No, sir.

Q. Of course, as an engineer operating an engine you had become familiar with the system of signals and switches at this point?

A. Yes, sir.

Q. You knew there was an interlocking tower there?

A. Yes, sir.

Q. Did you know how the movements of trains when they were moving against the current of traffic was governed?

A. Yes.

Q. How were they governed?

A. They were governed by the block signal indications.

Q. What kind of signals were they for movements against the current of traffic?

A. Dwarf signals.

Q. What is a dwarf?

A. A dwarf is one of these low down signals, with an arm on, I should judge about a foot long or ten inches.

Q. What kind of lights did they display at night?
92 A. Green and purple.

Q. Green indicates what?

A. Safety, on a dwarf.

Q. Purple indicates what?

A. Stop.

Q. When you went to work there as an engineer did you have your eyes tested?

A. Yes.

Q. For color blindness?

A. Yes.

Q. And do they test them every so often?

A. Yes.

Q. And did you ever suffer from any color blindness?

A. Not to my knowledge.

Q. After Mr. Mattern told you about this engine on the fence track, what is the next thing you did?

A. Mr. Mattern didn't tell me.

Q. Who told you?

A. Mr. Boyle.

Q. Tell us just what you did then?

A. We run back to the north end of the southern track and nosed in on the caboose, and took the caboose down to Tower I in front of the tower on the main track.

Q. Did you get any orders as to what to do before you started?

A. When I left the water plug Mr. Boyle told me we was to get a train off from the fence track for East Buffalo, and then we went down the main track, the westbound main track, headed in on the southern track, and as we call it, nosed in on the caboose, took
93 the caboose down to Tower I to Military Road there, and then Mr. Boyle told me that the conductor's orders was to turn the engine around and bring the caboose back down to the yard office, and shove it in on the rear end of the track.

Q. This train, as I understand you, then extended from some point up here at Tower H (indicating), around on this track (indicating), and down toward Tower I?

A. It extended further back towards Black Rock.

Q. And how far down towards Tower I did it come?

A. There is the lead into those tracks (indicating). Right there. (Indicating.)

Q. How far down did that train come?

A. It came down there to very near to where that lead is.

Q. Down towards this Tower I?

A. Yes, sir.

Q. When you got down to Tower I Boyle told you your orders were to turn the engine around?

A. And fetch the caboose down by the yard office, and take it on the track, and put it on the rear end of the train.

Q. Then what were you to do with your engine?

A. Then to come down to Tower I and couple on with the engine.

Q. Would that movement result in turning your engine around?

A. Yes, sir.

94 Q. That would turn your engine around, wouldn't it?

A. Going around the Y would turn the engine around. When I stopped at Tower I, I was not turned around.

Q. The movement would result in reversing your engine?

A. Yes, in going around the Y.

Q. When you first went down to Tower I you supposed that you were to hook up to this train and back up with it to East Buffalo?

A. Yes, sir.

Q. You can handle trains either way in the yard business, can you?

A. Yes, sir.

Q. After you got the order from Boyle to turn your engine around what did you do next?

A. The towerman stuck his head out of the window there, and

wanted to know if we were going to turn around, and I think that the brakeman said that he was, and he said—the two brakemen got off and went to throw the hand switches east of Military road—it don't show on that map there, and he wanted to know why we didn't go agin the current of traffic. He said he had permission for us on that track.

Q. And then what?

A. And then I asked him if he was sure it was all clear, and he said it was, that he had permission from 55, and I called to the two brakemen that was out at these hand switches to come on, that the towerman said he had permission for us to go on that track.

95 Q. What does against the current of traffic mean in the railroad business?

A. Going agin the direction that trains generally run on that track.

Q. That is the left-hand track, is it?

A. Yes, sir, the left-hand track.

Q. Supposing you had gone with the current of traffic what would have governed your movement, dwarfs or high-arm signals?

A. A high-arm signal with a green light for safety and a red light for danger.

Q. And if you had gone with the current of traffic could you have gotten over on the right-hand track when you struck the main lines of the New York Central? If you had gone with the current of traffic on the Y could you have gotten over on the right-hand main track east-bound?

A. No, you couldn't have got on the east-bound.

Q. Why couldn't you have got on the east-bound?

A. Because there is no cross-over in there. As it shows on the map there is what they call the lead, the switches open. Where that one track crosses (indicating) there was nothing but frogs in there at that time.

Q. Then if you went against the current of traffic on the Y could you get over on the east-bound track?

A. Yes, that would carry you over on the east-bound track.

Q. So that they had their choice of sending you in with the current of traffic on the Y and against the current of traffic on

96 the main track, or against the current of traffic on the Y and with the current of traffic on the main track.

A. That is as I understood it, and the engineer had nothing to show which way he should go.

Q. You didn't pick it out?

A. No, sir.

Q. Your engine when you got these instructions about going against the current of traffic stood where with reference to Tower I? Will you point it out to us?

A. I should say it stood there (indicating), with the cab right about opposite the tower.

Q. Where were your brakemen, Mullen and Boyle?

A. I don't know the scale of the map, but I should judge from

about that far (indicating) from where you pointed to Military road.

Q. They were some points east of Military road?

A. Yes.

Q. Did they come toward your engine?

A. Yes.

Q. Did you see where Mullen went?

A. Yes.

Q. Where did he go?

A. He walked up by the engine and got on the caboose.

Q. Did you see where Boyle went?

A. I didn't see where he went after I started the engine.

Q. Did he get on your engine?

A. Not that I saw. He was some distance behind Mullen.

97 Q. In the ordinary routine of doing business there was the conductor required to go with you when you made that turning movement?

A. Not the customary way of doing work of that kind.

Q. Was Mr. Boyle required to go with you when you made the turning movement?

A. Not the customary way. He didn't have to go any more than the conductor.

Q. What ordinarily would Mr. Boyle and Mr. Mattern have been doing with that train while you were turning your engine around?

Mr. Spratt: I object to it, as incompetent and improper.

The Court: He may answer.

Mr. Spratt: Exception.

A. Well, as the situation was there I expected Mr. Boyle to go along the train and couple up the air hose, working towards the conductor, and when he met the conductor they would continue back towards the head end of the train, taking numbers, and examining seals and seeing the doors were shut. There is a lot of work to do on that train to get it started.

Q. Does that work have to be done by your crew?

A. It has to be done by the conductor and two brakemen where there is no air inspectors.

Q. Was there any air inspector there?

A. I don't know if there is ever any in that yard.

Q. It was necessary for one brakeman to go with you, wasn't it?

A. Yes, sir.

98 Q. Were you operating at that time under rule 102?

A. Yes, sir.

Q. What does that rule say?

A. It says pushing cars with an engine or motor a flagman must be placed in a conspicuous place. I don't know as I can word it just as it is in the book.

Q. You are getting along very well. Conspicuous place where?

A. On the leading car. I will finish up—to give signals to the engineer.

Q. Had that rule been on that book since you were an engineer?

A. Then book of rules changes, and that is the second book of rules I had while I was in the service. I don't remember whether it was in the first book of rules when I entered the service or not, but it was in the one at the time of the accident?

Q. You had been working under it for some time, had you, that particular rule?

A. Yes, sir.

Q. When you are pushing a car you put a man on the front end of the car in a conspicuous position. What is he there for?

A. To give signals to the engineer.

Mr. Spratt: I object to that. The rule is the best evidence. I ask that it be stricken out. The rule itself is the best evidence.

The Court: The rule appears here, I suppose?

99 Mr. Ward: Yes, I would be glad to offer the rule. I offer rule 102, which reads as follows: "When cars are pushed by an engine or motor (except when shifting or making up trains in yards) a flagman must take a conspicuous position on the front of the leading car."

I ask Mr. Kinney what he was there for.

Mr. Spratt: I object to it.

The Court: He may answer if he knows. He can tell what the man was put there for.

Mr. Spratt: Exception.

A. He was put there to observe conditions on the track ahead, to see that you are not running over some people who is liable to be walking on or across the track, to see that you are not running into something, to observe signals, or in other words to lead the engineer, show him that the way is clear ahead.

Mr. Spratt: I ask that that latter part be stricken out. That is a conclusion.

Mr. Ward: It seems to me it could not be better expressed.

Mr. Spratt: Not from Mr. Kinney's point of view, that he was being led along there with a ring in his nose.

The Witness: I didn't have a ring in my nose.

The Court: We will let it stand. It cannot do any hurt—as an explanation of that rule.

Mr. Spratt: I take an exception to it.

100 Q. Mr. Kinney, was it the practice at that time to operate your engine in response to the signals of the head end brakeman?

Mr. Spratt: I object to it. The rules are the best evidence.

The Court: He may answer.

Mr. Spratt: Exception.

A. Yes, sir.

Q. And if for any reason the engineer is unable to see a signal or any other object ahead on the track, what controls his course?

Mr. Spratt: I object to that. The book of rules is the proper evidence, the best evidence, and this calls for the conclusion of the witness.

The Court: He may tell there what was done under the rules.

A. Signals from the brakeman on the car.

Q. At the time you started to go around there it had got to be what time of night?

A. Started from the south end of the southern track, do you mean?

Q. No, Tower I?

A. I should say it was about 8:30.

Q. What kind of a night was it?

A. Well, it was what you would call a nice night for the month of October.

Q. Do you remember how the wind was?

A. There was a gentle wind.

Q. From which direction?

A. Well, I should say—those main line tracks run——

Q. Pretty nearly north and south, according to that?

101 A. This wind came about from the southwest.

Q. After you saw Mr. Mullen get up on the caboose did he give you a signal to start?

A. Yes, sir.

Q. And how is that signal given?

A. That is given by a lamp at the side here (indicating), swung out this way (indicating).

Q. You were familiar with the method of giving signals in use by the New York Central at that time, were you not, Mr. Kinney?

A. Yes, sir.

Q. And those signals—there were a great many of them, weren't there? Now, tell us what the common way of giving a proceed signal is, the general customary way of giving a proceed signal is.

Mr. Spratt: I object to that. The book of rules contains that, and that is what was governing.

The Court: I will let him tell if he knows. He had a book of rules.

Mr. Spratt: Exception.

Q. What is the customary signal to proceed?

A. The customary signal to proceed by the hand is a person walking—their hand is down by their side, and they raise the hand out in this way (indicating), and drop it down by their leg (indicating) and raise it up this way. (Indicating).

Q. From the leg raised forward or out from the body?

A. Out from the body.

102 Q. From a downright position raised out from the body?

A. Yes, sir.

Q. How high?

A. It depends on the speed they want the engineer to move.

Q. How do you distinguish between a slow come-ahead and a fast come-ahead signal?

The Court: We will have to adjourn now.

(Adjourned until Tuesday, January 28th, 1919, at 10 o'clock, a. m.)

Tuesday, January 28th, 1919—
Ten o'clock a. m.

The Court: Juror No. 11 is reported ill in a message brought to the Court by Mr. Colby, a deputy sheriff. The message is to the effect that Mr. Curtis, one of our jurors, has been taken down with the flu. He sat in No. 11 on the jury. Shall we make a stipulation to proceed with the trial with the 11 jurors or shall we discharge them all and draw a new jury?

Mr. Ward: I am perfectly willing to stipulate to proceed with 11.

Mr. Spratt: So am I.

The Court: Then enter such a stipulation, that owing to the illness of Mr. Curtis it is stipulated the trial proceed and be concluded before 11 jurors.

103 JOHN W. KINNEY, the plaintiff, resumed the stand for further Direct Examination:

By Mr. Ward:

Q. How do you distinguish between a slow come-ahead and a fast come-ahead signal?

A. The speed that the signal is given, and also the size of the signal. If you are to go ahead slow, the movement of the signal is slow, and if you are to come ahead fast they move it in a larger, give a larger signal, and faster.

Q. I call your attention to page 87 of the book of rules. (Showing book to witness). Is that the plate indicating the method of giving proceed and stop signals?

A. Proceed and stop signal? One is and one isn't.

Mr. Spratt: I object to that. Hs asked him if that was the rule, calling his attention to page 87 of the book.

The Court: Calls his attention to some rule there?

Mr. Ward: I called his attention to page 87 and asked him—neither Mr. Spratt nor Mr. Kinney understood my question—I asked him whether that was the plate showing the method of giving the signals in the book?

Mr. Spratt: I ask that that be stricken out.

Q. Is that correct?

Mr. Spratt: I ask that the previous answer be stricken out.

104 The Court: Strike it out.

Q. Does that plate show the method of giving signals in the book?

A. As they are given on the railroad?

Q. No, as they are given in the book?

A. Yes, sir.

Mr. Ward: Now I offer in evidence page 87 of the book of rules, the first two plates on the page, showing a stop signal and a proceed signal, the stop signal reading "stop—swung across the track." The proceed signal reads: "Proceed—raised and lowered vertically."

(Page 87 of the book of rules received in evidence and marked "Exhibit 2".)

Q. Now, in practice how is the stop signal given?

Mr. Spratt: That I object to. The rules of the company provide how it shall be done. If there is a violation by Mr. Kinney or anyone else——

Mr. Ward: He was not giving this signal.

Mr. Spratt: Or receiving an improper signal——

The Court: Now, perhaps I don't understand. As I understand it, here is a rule, and he is just simply describing the way it is executed.

Mr. Ward: Yes.

The Court: I will take it and give you an exception.

Q. Now, in practice show us how the stop signal is given?

105 A. The stop signal is given with the hand or lamp swung across the track in this way (indicating).

Q. You are swinging across the body?

A. Yes, sir.

Q. And how high up in the swing does the hand come?

A. It is the same with that as it is with others, if you want to stop in a hurry they give that kind of a signal (indicating).

Q. You indicate a quick movement across the body?

A. Yes, sir. And if it is not necessary to stop so sudden, this way (indicating),—a general stop.

Q. The question I asked you is how high up does the hand come in giving the stop signal?

A. Well, some of it will come up not quite as high as the shoulder in general practice.

Q. In practice?

A. Yes, sir.

Q. Now, the proceed signal is given in practice how?

Mr. Spratt: The same objection.

The Court: Same ruling.

Mr. Spratt: Exception.

Q. Do you want to take something in your hand?

A. It is not necessary.

Q. All right, go ahead.

A. For instance, standing up, they want you to come ahead slow, come up about like that (indicating).

106 Q. You are indicating a movement with——

A. In the day times with the hand, and in the night it is a lantern.

Q. You are indicating a movement with your hand down to your side, raised up to a nearly horizontal position, and then dropped?

A. Yes, sir.
Q. With your arm kept straight out from the body?
A. Yes, sir.

Mr. Spratt: I didn't think he held it up as high as a horizontal position.
Mr. Ward: You can cross examine him about it later.
Mr. Spratt: What was that last signal?
Mr. Ward: That is a proceed signal.
Mr. Spratt: Just show a proceed signal again.

Q. Mr. Spratt wants you to show a proceed signal again as it is given in practice.
A. Well, as I have already stated, sometimes it comes up higher. It depends on how they want you to act on it.

Mr. Spratt: I thought you said that was a stop signal.
Mr. Ward: A stop signal is swung clear across the body.

Q. The higher it comes, what does that mean?
A. It means you are to come ahead faster.
Q. The higher the lantern is swung the faster the movement calls for? Is that the way I understand you?
A. And the rapidity of the signal also.
107 Q. In practice is the movement given by raising the lantern vertically up and down?
A. The come-ahead signal?
Q. Yes, sir.
A. No, sir, I never saw it given that I can remember in the 18 years.
Q. What effect would that have on the lantern commonly in use at that time to raise and lower the lantern vertically? What effect would that have on the light?

Mr. Spratt: I object to it, as incompetent and immaterial.
The Court: Same ruling.
Mr. Spratt: Exception.

A. It would have a tendency to put the light out.
Q. So that instead of raising and lowering the lantern vertically up and down like this (indicating), do I understand you to say that it is swung out like this (indicating)?
A. Yes, sir.
Q. With the arm starting from the side and raised up according to the rapidity with which——
A. And also why they couldn't give that signal with a link and pin coupler, and the switchman had to get in between the cars here to pull the pin; the engineer couldn't see that kind of a signal to come ahead. The switch man would have to swing his light so that it would go outside of the box cars.
Q. In giving signals to either stop or proceed is it the practice to give them from time to time, or is it the practice to keep right on giving them all the while?

108 A. It is the practice to give them from time to time.

Q. After you left Tower I what was the first signal you received from the front end brakeman?

A. The proceed signal.

Q. Where did you get that?

A. When he got on the caboose at Tower I.

Q. That was given from what point on the caboose?

A. The leading platform.

Q. Were you able to see the person of the man giving the signal?

A. On the platform?

Q. Yes.

A. No, I was not.

Q. And before the signal was given to you was the brakeman's light in your view until he had given the signal, his lantern in your view, I should say?

A. I couldn't say that it was continually.

Q. After he gave you the proceed signal did his lantern disappear from your view?

A. Yes, sir.

Q. And was that the ordinary practice?

A. Yes, sir.

Q. You knew, I suppose, that the brakeman had a white and a red lantern, did you, available for his use on the caboose?

A. Yes, sir.

Q. Mr. Kinney, that caboose was equipped with air connections, wasn't it?

A. I believe it was.

Q. Do you know whether or not the brakeman connected the air between the caboose and the engine?

109 A. I am not positive about it.

Q. Could he have done so?

A. Yes, sir.

Q. If the air had been connected between the caboose and the engine could the brakes have been applied from the caboose?

A. Yes, sir.

Q. Who does the air connection, the engineer or the brakeman?

A. The brakeman—under those conditions, the brakeman.

Q. Whether or not the brakeman on this occasion connected the air between the engine and the caboose you don't know?

A. No, I don't.

Q. After you got this proceed signal from Mr. Mullen what did you do?

A. Started to move up from Tower I up towards Tower 55.

Q. Were you moving at that time in a generally northeasterly direction on a curve?

A. Yes, sir.

Q. And you were proceeding against the current of traffic?

A. Yes, sir.

Q. Did you know that your movement was governed by dwarf 6?

A. Yes, sir.

Q. And you were familiar with its location?

A. Yes, sir.
Q. You had made movements over that track before?
A. Yes, sir.
110 Q. And had previously been governed by that dwarf, had you?
A. Yes, sir.
Q. Now, as you came up toward Hertel avenue what did you do?
A. As we came up towards Hertel avenue, why, slowed up speed, and asked the fireman to look out to see if there was any street cars coming from over towards the Falls tracks there, over towards the tracks that I was on.

Mr. Spratt: I object to what he asked the fireman, and ask that that part be stricken out.
The Court: Strike it out.
Mr. Ward: If your Honor please—well, I want to offer a rule first.

Q. Mr. Kinney, will you turn to that rule governing the calling of signals between the fireman and the engineer?
A. It might take some time to find it, because I can't remember the number of it.

Mr. Ward: Well, I will try to find it.
Mr. Huntington: No. 524.

Q. Is that the rule? You don't remember these things as well as you used to.
A. I beg your pardon. I think Mr. Ward wants another rule.
Q. Page 127 of your book of rules.
A. I think if you look at 98-*C* that will be the rule that you want.

Mr. Ward: I offer them both. I offer rule 98-*C*, page 41, reading as follows: "Enginemen and firemen, or motormen and helpers, must observe signals at block stations, ends of double track,
111 junctions, rail crossings at grade, drawbridges, and communicate to each other the position of the signals."

Mr. Spratt: I object to that. That has no application to this place in question.
The Court: Objection overruled.
Mr. Spratt: Exception.
Mr. Ward: Also rule 524, governing the conduct of firemen and helpers, found on page 127, reading as follows: "They must keep a constant lookout ahead (except as to firemen when engaged in firing), and give instant notice to the engineman or motorman of any danger signals or obstructions on the track."
Mr. Spratt: I object to that, as not governing the situation here.
The Court: Same ruling.
Mr. Spratt: Exception.
Mr. Ward: As to the competency of the evidence, I invite your Honor's attention to the discussion on Point 3 in a brief of the Court of Appeals where this same evidence was under discussion.

Perhaps I can make my point clear by a very brief discussion of it. The point I make is that Mr. Kinney's conduct——

Mr. Spratt: I object to that. That is a matter that is not open for discussion. It is a question of ruling on the law when you get to it.

The Court: You say it is discussed in this point III?

112 Mr. Ward: Point III-A, (Showing to Court).

The Court: I will allow it.

Mr. Spratt: Exception. You refuse my motion to strike out the conversation between him and the fireman?

The Court: Yes, motion denied.

Mr. Spratt: Exception.

Q. Did the fireman do that?

Mr. Spratt: I object to that, as calling for a conclusion, what the fireman did.

The Court: What he saw him do he can tell.

Mr. Ward: That is all I am asking him.

Q. Did the fireman do that, as you observed?

Mr. Spratt: Exception.

A. Yes, sir, looked out of his side cab window over towards the Falls tracks, and announced that there was no street cars coming.

Q. At what point was that? How far before you got to Hertel?

A. I can't tell the exact feet, but I should say it was about three car lengths for the caboose was going onto Hertel avenue.

Q. Three car lengths? A car length is about 40 feet?

A. Yes.

Q. Then, what is the next thing that occurred?

Mr. Spratt: I object to it, to his stating anything in reference to any conversation had with the fireman.

The Court: He asks what is the next thing that occurred.

Mr. Spratt: I simply want to reserve that, because it was

113 gotten in the other way.

The Court: Same ruling.

Mr. Spratt: Exception.

A. The fireman was standing on the deck of the engine when he announced to me there was no street cars coming, and he looked out the fire window across the boiler head, and announced the dwarf signal green to me.

Mr. Spratt: I ask that that be stricken out.

The Court: Do you want that stated in the form in which it was said? Is that the point? You don't want that at all?

Mr. Spratt: I don't want it at all.

The Court: Objection overruled. He can tell what happened there between him and this man giving this notice.

Mr. Spratt: I say, it is incompetent and hearsay.

The Court: What he heard the man say?
Mr. Spratt: What he heard the fireman say.

Q. What did the fireman say to you?
A. He announced the dwarf signal green to me.

Mr. Spratt: I object to it, on the same grounds.
The Court: Same ruling.
Mr. Spratt: Exception.

Q. At the time that he said the dwarf signal was green where did he stand?
114 A. I should say about in the center of the engine deck.
Q. Which side was he looking out of?
A. My side.
Q. That was about how far before you had reached Hertel avenue, or was it on Hertel avenue?

Mr. Spratt: I object to that as leading and suggestive.

Q. Where was it in reference to Hertel avenue?

The Court: Where was it? That he may answer.

A. As I said before, I can't tell just the exact feet. I should say it was about two carlengths from Hertel avenue. It might have been a carlength.
Q. That he made this announcement to you?
A. Yes. It might have been a carlength and a half.
Q. Did you at that time see that signal?
A. Yes, sir.
Q. And what did you see?
A. I saw a green light.
Q. In railroad operations where there is a fireman and an engineer on the same engine, is it customary for them to call the fixed signals to each other?
A. Yes, sir.

Mr. Spratt: I object to that. The rules are the best evidence.
The Court: He is asking about the custom.
115 Mr. Spratt: I object to it, and I say the rules govern. Incompetent and improper.
The Court: Same ruling.
Mr. Spratt: Exception.

Q. Was that the way you had operated all day?
A. Yes.

Mr. Spratt: I object to it, on the same grounds.
The Court: Same ruling.
Mr. Spratt: Exception.

Q. This gentleman that called that signal green to you, that is, Mr. Sauer that you referred to in your testimony yesterday?
A. Yes, sir.
Q. Do you know where Mr. Sauer is now employed?

A. Only what he told me.
Q. What did he say?
A. That he is working for the New York Central.
Q. And he is here in court, isn't he, or was yesterday?
A. Yes, he is here in court.
Q. After receiving this announcement from Mr. Sauer, and observing that the light was green yourself, what did you do?
A. I proceeded up towards Tower 55.
Q. At what rate of speed did you go?
A. I should say about six or seven miles an hour.
Q. At that time were you receiving any signal from your head end brakeman?
116 A. Yes, sir.
Q. What signals were you receiving?
A. Come ahead signal.
Q. At that time could you observe his person or any thing about his light?
A. No, sir.
Q. In what manner did his light move in the come ahead signal that you observed?
A. From the side of the caboose out and upward.
Q. Was it a continuous signal that he was giving you, or was he giving it from time to time?

Mr. Spratt: I object to it. Let the witness go on and state what was done without leading.
The Court: Do you want me to rule on the objection?
Mr. Spratt: Yes.
The Court: I will overrule that. Go on and state what happened there.

A. He gave me a proceed signal from time to time.
Q. As you got over Hertel avenue did there come a time when you had any difficulty in observing that dwarf light?
A. Yes, sir.
Q. When did that come?
A. About as I was getting onto Hertel avenue, passing over it, along about there.
Q. And what prevented your seeing the dwarf?
A. The leak of steam from this engine.
Q. From what part of the engine was this steam coming?
117 A. It was coming from the left piston rod, a leak in the belly of the boiler just back of the saddle and the union, where the steam pipe connects onto the injector, and there was some from the throttles in the injector, the injector throttles in the cab.
Q. Up to that time had this leak of steam interfered with your seeing any lights in the night time? Had this leak of steam up to that time interfered with your seeing any lights in the night time?
A. Well, I hadn't operated that engine in the night time, in what I would call in the night time, up until this time.
Q. All right. Then it hadn't, had it?
A. No, sir.

Q. What caused it to interfere with your vision as you crossed Hertel avenue when you had been able to see the dwarf before you got to Hertel avenue?

A. The change of the direction of the engine.

Q. That did what?

A. Blowed the steam through and under the boiler, out in under the running board on the right-hand side, and left it trail up alongside of the boiler.

Q. Did it interfere with your seeing Mr. Mullen's signals?

A. No, because Mr. Mullen's signals was up higher.

Q. This dwarf sets about how high from the ground? (Indicating.)

118 A. Well, I think the light is lower than you had your hand.

Q. 18 to 24 inches; something of that sort?

A. I don't think it is over 24.

Q. After you lost sight of this dwarf when you were at Hertel avenue, did you continue to receive signals from Mr. Mullen?

A. Occasionally, yes, sir.

Q. And what signals were they?

A. Come-ahead signal.

Q. Were they the same signals that you have previously described?

A. Yes, sir.

Q. And you continued to receive those come-ahead signals from Mr. Mullen down to what point?

A. The point of the accident.

Q. And at what speed had you been proceeding?

A. Six or seven miles an hour.

Q. Did there come a time before the accident when you changed or altered the speed of your engine?

A. At the point of the accident I changed my speed, that is, the speed of it, and stopped it.

Q. What caused you to do that?

A. The change in Mullen's signal.

Q. Could you tell whereabouts you were when Mullen's signal seemed to change?

A. I couldn't tell positively, because I couldn't see the land marks or the ground.

Q. How far did you run after noticing some change in Mullen's signal?

119 A. Well, I couldn't say that I run any distance, because when I noticed the change in Mullen's signal I got off from the seat box, climbed over the quadrant, and reversed the engine, and I applied the air, and going at that rate of speed I wouldn't be apt to go very far.

Q. Did you do that as quick as you could?

A. Yes, sir.

Q. What change did you notice in his signal?

A. His signal in form appeared to me pretty near the same as the come-ahead signal, only the speed of it increased, more rapidly, and why I acted on that is because I couldn't see any reason for the——

Mr. Spratt: I object to that. He has told what it was.

Q. Why did you stop? If it appeared to you to be a more rapid come-ahead signal why did you stop?

A. I couldn't see why the rules required me to increase my speed at that particular point passing over them frogs.

Q. So that you decided to stop?

A. Yes, sir.

Q. Did you proceed to stop as soon as you detected any change in Mr. Mullen's signal?

Mr. Spratt: I object to that, as leading and suggestive.

The Court: He may answer.

Mr. Spratt: Exception.

A. Yes, I did proceed to stop as soon as I noticed the change in his signal.

Q. At any time did Mr. Mullen give you a stop signal?

Mr. Spratt: I object to that.

Q. That you saw?

Mr. Spratt: Let him tell what was done, what he saw. It is calling for a conclusion.

Mr. Ward: At any time did Mr. Mullen give a stop signal that he saw.

The Court: He may answer.

Mr. Spratt: Exception.

A. No, sir, he didn't give me no stop signal that I saw.

Q. At any time did Mr. Mullen display his red light to you?

A. No, sir.

Q. At any time were you able to observe his person?

A. No, sir.

Q. Were you in a position where you could look along the edge that caboose?

A. Yes, sir.

Q. Could you have observed his person in the light of his lantern he had leaned out beyond the edge of the caboose?

A. I might have observed his person in some places, and some places I couldn't.

Q. Now, Mr. Kinney, you were familiar with the rules and practices of the company, weren't you, at this time?

A. Yes, sir.

Q. If a green light was displayed to you at Hertel avenue from Scharf 6, what did that indicate as to the position of the switch that led out onto the main track?

A. It indicated that that switch was open, and I had a right to proceed out there.

Q. If a green light were showed to you at Hertel avenue what did indicate as to the position of the lights and switches on the main track?

A. That they should be at danger.

Q. If a green light was displayed to you at Hertel avenue under the rules and practices of the company——

Mr. Ward: I want to offer the rule.

Q. Were you familiar with this rule, page 18, of the block signal system? This is the same rule that Mr. Reithenburg was asked about——

Mr. Ward: Do you want to refer to this before I read it to him?

Q. Were you familiar with this rule, bottom of page 18, rules of the block signal system governing the use of, and so forth, reading as follows: "If a signalman has prepared for an approaching train, and it is found necessary to stop them or change the position of the switches or signals to give another route, the signals must be set at danger but no switch changed or signals given to a train on a conflicting route, until the train which first had the right of track has come to a full stop." Were you familiar with that rule?

A. Yes, sir.

Q. Under that rule, Mr. Kinney, if that light showed green to you when you were at Hertel avenue could any movement be permitted on the main track before you had stopped?

122 Mr. Spratt: I object to that. The rule speaks for itself.

Juror No. 2: I would like the number of that rule.

Mr. Ward: In the block signals they don't number them.

The Court: Objection overruled.

Mr. Spratt: Exception.

A. No, sir.

Q. So that even if they took the light away from you they couldn't go any further in the movement until you had stopped, could they?

Mr. Spratt: That I object to.

The Court: Same ruling.

Mr. Spratt: Exception.

A. Not according to the rule.

Q. Was that a rule which was observed in practice while you worked there?

A. Yes, sir.

Mr. Spratt: Same objection.

The Court: Same ruling.

Mr. Spratt: Exception. The rule stands for itself.

The Court: He is an experienced engineer of long standing, and this is his understanding of the rule under which he was acting He may tell about it.

Q. When you began to have some doubt about this signal of Mr. Mullen's, when it seemed to be going faster then you would expect

under the circumstances, and stopped your engine, what happened?

A. The Michigan Central engine No.—the engine of train
123 No. 3, did what we called cornered it.

Q. What happened to it?

A. Tipped over.

Q. Both engines, or don't you know about the other engine?

A. I don't know about the other engine because I was pinned in under the engine that I had.

Q. You stayed in your place on the right-hand side of your engine during that whole movement, I suppose?

A. Yes, sir.

Q. Had you observed anything of the approach of that Michigan Central train on the main tracks?

A. No, I hadn't.

Q. Were you in a position to observe it?

A. No, I wasn't.

Q. Had your fireman called it to you?

A. Not to my knowledge.

Mr. Spratt: I object to that.

Q. When your engine tipped over where did you find yourself?

Mr. Spratt: I object to that, again, the conversation, as to what the fireman said or didn't say, on the same grounds. I urge it is hearsay.

The Court: Same ruling.

Mr. Spratt: Exception.

The Court: It will stand. Proceed.

A. When the engine tipped over, as near as I could locate
124 myself I was laying between the rear end, in the gangway, between the rear end of the cab and the front end of the tender.

Q. You hadn't jumped, had you?

A. No, sir.

Q. Up to that moment had you seen anything of Mr. Boyle in your cab?

A. No, sir.

Q. Had Mr. Boyle or anybody else spoken to you that you knew of?

A. Nobody, only the fireman at Hertel avenue.

Q. Did you observe how the fireman got out when the engine tipped over?

A. No, I did not.

Q. As the engine tipped over were you in the space between the tender and the engine?

A. I was throwed in that space.

Q. Was there anybody else in there when you got in there?

A. No, sir.

Q. Then the engine carried over, and you were caught under what part of it?

A. As near as I could locate myself my right foot was cut off on the rail of the front tender beam, and the left one was doubled up in under the tender somehow. I couldn't tell how that was.

Q. Did you lay over the rail?

A. Across one of the rails with my back, with the handle of the tender resting on my hip, on my thigh, and the lower part of my body.

Q. It was not the rail you were running on? It was the rail of the adjoining track?

125 A. Well, I couldn't see. It seems the tracks were moved; I should imagine it was on the adjoining track.

Q. Were you unconscious?

A. Not very long.

Q. When you regained consciousness what is the first thing you knew?

A. That there had something happened, that I was buried in under the coal and in a cloud of steam.

Q. Was there anybody there?

A. No, sir.

Q. Who first came to you?

A. Well, now, my recollection of it is a man I never saw before.

Q. Was it that man (indicating)?

A. It looked to me like the man.

Q. What did he do for you?

A. Somebody brushed the coal off of my face and got me, I would call, cleaned up a little, got me so that I could breathe, and cleaned the dirt off of me to a certain extent.

Q. And your crew, Mr. Mullen, and your fireman, Mr. Sauer, and Mr. Boyle, were they there?

A. I don't remember seeing Boyle there at all but I think Mr. Mullen tried to dig in under the tender and locate how I was fastened.

Q. Was that after Mr. Freeman had come there or before?

A. After; and then Mr. Goulding was there——

Q. He is the engineer of the other engine?

A. 446.

126 Q. Do you remember the other engine, another train coming along from Niagara Falls, and running into you?

A. I haven't any knowledge of that. I didn't have at that time.

Q. So that your first recollection was this man Freeman trying to get the coal off your face?

A. Yes, sir.

Q. Were you scalded in any way by the steam?

A. Why, the hot water and steam running out of the boiler where the injector pipes had been knocked out was running back—it was all down grade, running in under this tank, and steam arising was scalding me. Somebody plugged up the faucet, plugged up the hole where the faucet was knocked out of the tender, and I got hold of Mr. Goulding and pulled him down so that he could hear, and asked him to pull that handkerchief out of there so as to let the cold water run on me and not to scald me.

Q. And did they do that?
A. Yes, sir.
Q. How long were you there under that engine?
A. Well, I should say it was from an hour and 40 minutes to two hours.
Q. And how were you relieved?
A. By their getting a wrecking train from East Buffalo and lifting the tender off from me.
Q. And then they took you where?
A. To the Emergency hospital.
Q. And what did you find was wrong with you, John, when you got there?

127 A. They said that I was pretty well smashed out—Well, I don't know as they told me just what was the matter with me. When I was laying in the wreck I asked them to have my doctor at the hospital, and when they laid me on the operating table I inquired for my doctor, and they said that he wasn't there, and I believe Dr. Marcy went to the telephone to see if he had been notified, and he had not been notified, and he wanted to know if he should wait until they get my doctor there. He said it would probably be two hours before they get him there, and I says, "No, go ahead, and do the best you can. I am in bad enough shape now."

Q. So that Dr. Marcy, the New York Central surgeon, operated on you?
A. Yes, sir.

Mr. Ward: We do not complain of that. We think that Dr Marcy did everything that anyone could do.

Q. When they got through what was left of you?
A. The left foot was done up in a plaster-of-paris cast and left there for six weeks, and the right foot was taken off.
Q. Where is it off?
A. It is off about there (indicating).
Q. You indicate a spot about three inches above your shoetop?
A. Yes, sir.
Q. How long did you stay there in the hospital?
A. Six weeks.

128 Q. Did you have any trouble with your back or hips where you laid across this rail?
A. Yes, sir.
Q. What trouble was that?
A. It was quite a considerable pain—a sore place there.
Q. And then when they took you out of the hospital where did they take you?
A. Well, I got a neighbor of mine to take me home.
Q. You lived with your wife and family at that time on Bailey avenue?
A. Yes, sir.
Q. And they took care of you there?

A. No—oh, Dr. Marcy took the plaster-of-paris cast off my left foot then when I got home.

Q. How was it?

A. It was twisted over—something in this shape (indicating). The heel was up on the inside of the foot and it was practically rigid.

Q. Been that way ever since?

A. No, I had it massaged for about two months and got it so that I could get a shoe on it, and begin to put a little heft on it.

Q. Has it troubled you since?

A. Yes, sir.

Q. What is the trouble with that left foot?

A. It is very tender. If I catch a little cold, or get——

Q. Just show the jury how you walk on that left foot.

Mr. Spratt: I object to that. The jury have seen him when he walked in and out.

129 The Court: Oh, very well, the jury may see him again now.

The witness walks in front of the jury-box.

A. That is all the side motion I can get out of it.

Q. Of the left foot?

A. Of the left foot. You see there is the shape of it (indicating), and then I threw my heft on the outside of my foot, and there is a bunch—it was crippled up in the wreck somewhere, and I can't understand it, there is a big bunch here (indicating) with a corn or callus that I am not able to keep off, and that is the reason I have to wear it very thin. If I happen to step on a little ridge on the sidewalk, practically on a bump, it would be so tender that I couldn't stand the pain, and I carry the cane to defend that ankle, as I might say.

Q. Your wooden leg is your best leg?

Mr. Spratt: I object to that, as incompetent and improper.

A. I have told Dr. Marcy——

The Court: Same ruling.

Mr. Spratt: Exception.

A. I have told Dr. Marcy——

Q. Not what you have told Dr. Marcy. Just tell us about your foot.

A. Well, I was going to tell you about the foot.

Q. Tell us about the foot, not what you said to Dr. Marcy, but what the condition of your foot is.

130 A. Well, the condition of my foot is that I wish it was off.

Mr. Spratt: I object to that, and ask that it be stricken out.

Mr. Ward: I consent to that.

The Court: Strike it out.

Q. Did it cause you pain?

A. It causes me more pain than a wooden foot.

Mr. Spratt: I ask that that be stricken out.
The Court: Strike it out.

Q. Are you able to do any manual labor on that foot by walking?
A. The broken foot?
Q. Yes.
A. Not as much as I can on the wooden foot.

Mr. Spratt: I ask that that be stricken out.

A. I can stand still on it, better than I can on the wooden foot.

Mr. Spratt: Exception.

Q. Has a better balance, I suppose?
A. No, because the pressure of the wooden foot comes up here (indicating) and if you stand continually on it you shut the blood circulation off. If you are walking on it you give it a certain amount of circulation.
Q. Have you had trouble with your stump?
A. Yes, I have trouble with it.
Q. Now, how long did you stay home there after the accident before you did anything?
A. I was in the hospital six weeks, went home on Thanks-
131 giving Day, and I got my artificial leg about the 15th of next March, and I wasn't able to find anything that I could do, or wasn't able to do anything until the next season.
Q. That is, the spring of 1910?
A. Yes, sir.
Q. What did you do then?
A. Well, I didn't do very much. I undertook peddling medicine.
Q. Were you able to get around to do that?
A. No, that is the reason why I give it up.
Q. Did you earn any money?
A. No, I didn't earn any money.
Q. Well, what is the next venture you made?
A. Then I tried several places for employment, and they said they could get all the able bodied men they wanted and I undertook the hotel business at Akron.
Q. What hotel did you run there?
A. The American Hotel.
Q. How long did you run it?
A. From the 3rd day of April, 1912, to the 15th day of December, 1914.
Q. Up to the time that you went to that hotel had you earned any money?
A. No, sir.
Q. What luck did you have with your hotel?

Mr. Spratt: I object to it, as incompetent.
Mr. Ward: It is not a right question. I withdraw it.

Q. Were you able to do your hotel work?
A. No, sir, not entirely.

132 Q. And what effect did being around your hotel and standing and so on have on your legs?
A. It made them very painful.
Q. In the hotel business you have to stand up a good deal of the time?
A. Yes, to take care of the hotel properly.
Q. And how long did you keep that up? How long did you keep up the hotel business? I think you gave us the dates a moment ago, say twelve months or a year?
A. No, I think it will be about 19 months.
Q. Then did you give up the hotel business?
A. Yes, sir.
Q. What did you do after that, Mr. Kinney?
A. Well, I took a rest from the 15th of December until the 15th of next May. Then I moved down to the farm where I am now.
Q. This is a farm down on the Ellicott Creek?
A. Tonawanda Creek.
Q. A farm that formerly belonged to your uncle?
A. Yes, sir.
Q. Did you work this farm?
A. I worked at it.
Q. What kind of farm work can you do?
A. I can drive a team *on* anything that you can ride on.
Q. Can you follow the plow?
A. A riding plow, not a walking plow.
Q. Do you do all the work yourself?
A. No, sir.
Q. Have you any other means of livelihood except that?
133 A. No, sir.
Q. Have you made a living of that?

Mr. Spratt: I object to that, as not the proper method of proving damages.
The Court: I think I will sustain the objection to that.

Q. What doctors have you consulted about your injuries?
A. Since the accident?
Q. Yes.
A. Well, Dr. Holmes, Dr. Hoffman, and Dr.—what is this fellow's name up here at the General hospital? Marshall Clinton. And Dr. McPherson.
Q. Dr. Gardner?
A. No, Dr. McPherson up here at the General hospital.
Q. Marshall Clinton?
A. Yes, sir.
Q. He is over in Europe?
A. You asked which ones I had since the accident, as I understood the question.
Q. Yes, that is right.
A. And also Dr. Grover Wende.
Q. What was the occasion of your consulting Dr. Wende?
A. The end of the stump was broke open.

Q. How much of the time have you had that stump open?
A. It was open—well, I can't give it positively, but I should say about eight or ten months while I was in the hotel.
Q. Since you have been on the farm does it get open?
134 A. No, it hasn't since I have been on the farm.
Q. Do you have any trouble with your back?
A. Yes, sir.
Q. What is that trouble?
A. When I catch a little cold my back gets quite painful and lame.
Q. Can you do any lifting?
A. Yes, I can lift, but not very much above my waist.
Q. Can you pitch hay?
A. Not very much, I can pitch hay light—what I call woman fashion.
Q. About how much have you spent for medicines and crutches and bandages and doctors, and so on, arising out of these injuries?
A. I couldn't give a positive account of it, for I never kept account of it.
Q. Well, about what would you estimate it to be?

Mr. Spratt: I object to it. I object to it if he can't tell. He says he can't tell.
Mr. Ward: He has always testified approximately, and he has been permitted to do so, so that we would not be at the expense of bringing in all these doctors. Looking at page 292 perhaps you would consent, as your associates have done on other trials that you let me make that proof.
Mr. Spratt: All right.

Q. You can tell us what it has cost you approximately, John.
A. I should say between a thousand and fifteen hundred dollars altogether.

Mr. Spratt: I object to that. I want it just as it reads
135 there (indicating) $200.00. I am willing to have that, but I object to it, and ask that it be stricken out. I understood when I consented that it was what he said here.
Mr. Ward: That is all right. Mr. Spratt is willing to have me read in evidence, as I understand it, Mr. Kinney's testimony which occurred on the trial two years ago before Mr. Justice Wheeler.

(Reading:) "Q. Could you give this court an idea about how much money you spent for medicines, and these legs, and crutches, and things? A. Well, I haven't any exact book accounts, but I should say it was somewheres around seven or eight hundred dollars. Q. And these doctors that have treated you from time to time, what has that cost you, Dr. Clinton and Dr. Wende and so on? A. Well, I haven't ever figured it up. It cost me five and six dollars every time I went to see Dr. Wende, and it cost two dollars every time I went to see Dr. Clinton, so that is as near as I can get at it. Q. Well, could you tell us about what it would total up, John? A. Outside of the crutches, and—— Q. And the medicines, what you have

paid the doctors. A. As I said before, I couldn't give you any exact account for Dr.—as I paid those bills as I went along. Q. Well, give us your best judgment. Mr. Hollister doesn't mind that. A. Well, I should say it was around $200.00."

136 The Court: That is, $200.00 to add to the seven or eight?
Mr. Ward: Yes.
The Court: For doctors?
Mr. Ward: For doctors and medicines and crutches and everything. That was two years ago.

Q. In the last two years have you expended any moneys for medicines, physicians, since the last trial, arising out of these injuries?
A. Not for medicine—no, not for medicine.
Q. Have you expended any money for artificial legs or anything of that sort?
A. Yes.
Q. How much have you spent on artificial legs since the last trial?
A. Why, as I said before, I didn't keep no track of the incidental expenses. I broke the shank of this leg a year ago last June. (Indicating.) That cost me $25.00. And I have to have a new foot. Just about a month ago I broke one of these side plates off. (Indicating.) That cost me $4.00 to have that repaired.
Q. How long does one of those artificial legs last?
A. I can't give you any definite time.
Q. Mr. Flynn reminds me of a point that I hadn't brought up. Were you going up or down grade around that curve?
A. Up grade.
Q. And did going up grade require a little more power than going——
A. On the level or down grade.
137 Q. And did that tend to increase the volume of steam escaping from these leaks?
A. Yes, sir.
Q. Some time after this accident, and while the conditions were the same as they were there, you and I went down and made some measurements, didn't we, as to where the fouling point was?
A. I was down there with somebody, but I don't remember just who.
Q. How far back did you find the fouling point to be from the frogs?
A. Well, I didn't make any memorandum of it, but I remember it was—on an engine two foot and a half overhang it was about 27 feet.

Mr. Ward: Mr. Spratt, do you make the same stipulation about Mr. Wing's figures as appears at page 276 of the trial before Justice Wheeler, on the bottom of the page?
Mr. Spratt: Yes.
Mr. Ward: It is stipulated that from Hertel Avenue to dwarf 6 is 457 feet. From dwarf 6 to the frog——
Mr. Ward: From the center of Hertel Avenue.
Mr. Ward: All right. From dwarf 6 to the frog is eighty-seven feet, and the fouling point is 27 feet back.

Q. That caboose that you were pushing was about how long?
A. Over all?
Q. Yes.
138 A. It must be 40 or 45 feet.
Q. How far out ahead of you does your engine stick from where you sit in your cab?
A. I should say about 40 feet.
Q. So that when the front of your engine reached the fouling point your position in the cab would be about how far past the dwarf?
A. It would be pretty close to it.
Q. How far back of you does your engine extend where you sit in the cab?
A. I don't understand you, Mr. Ward. For any railroad——
Q. I am not talking about the tender. I am talking about the engine.
A. None at all.
Q. You are in the back end of it?
A. In the back end of it.
Q. How far back of that is the tender?
A. The length of the tender or——
Q. Yes.
A. I don't know as I ever—the tender of that locomotive must be 25 or 30 foot.
Q. From the time that the steam first commenced to obscure this dwarf signal down to the time of the accident did you endeavor to observe it?

Mr. Spratt: I object to that, as leading and suggestive.
The Court: That may stand, if he observed it. You may answer.
Mr. Spratt: Exception.

A. No, I didn't observe it.
Q. Did you endeavor to observe it? Did you try to observe it.
A. To a certain extent I did.
139 Q. What do you mean by that? Just explain that.
A. I meant that Mr. Mullen's signal was the signal that governed the movement——

Mr. Spratt: I ask that that be stricken out, as calling for a conclusion of the witness.
Mr. Ward: He hadn't finished his answer yet. Go ahead.

A. It was my duty to see the signal if I could, but I don't know what word to use there. It was not as important to see the dwarf signal as it was Mullen's signal.

Mr. Ward: All right. That is all. You may cross-examine.

Cross-examination.

By Mr. Spratt:

Q. Mr. Kinney, at the day of this accident you had been an engineer how many years?

A. A trifle over eight years.
Q. And before that you had been a fireman how many years?
A. Ten.
Q. So that you knew all about the different parts of the engine, did you not?
A. Yes, sir.
Q. Knew about the repairs made on them? Had you ever done any repairs yourself?
A. I had worked now and then with a machinist, helped out. That is, when I was firing, not *af not* after I got to be an engineer.
Q. Before you got to be an engineer, as a fireman, you had
140 to learn how to make repairs, didn't you?
A. No.
Q. You were in the machine shop some?
A. No, we didn't have to learn.
Q. Well, you did, didn't you?
A. Not very much, I didn't.
Q. But during this 18 or 20 years that you have been running an engine you knew all the parts of an engine, did you not?
A. I knew what they were called.
Q. While you were running an engine different parts had gotten out of repair, hadn't they?
A. Sometimes they had.
Q. So that you knew generally all this period of time the different parts of the engine, and how they acted, didn't you?
A. I knew their functions, yes.
Q. And that they got out of repair at different times?
A. Yes.
Q. You also knew that you had a right when you were called out to take out an engine to see the report that the engineer had turned in when he turned in that engine the day or night before, didn't you?
A. No, sir.
Q. Didn't you know that under the rules you had a right to ask for and see the reports made by the engineer who last turned in that engine?
A. You have got one on me. I don't know any such rule.
Q. You don't know of any such rule?
141 A. No, sir. If you can show it you can do better than I can.
Q. Please don't ask me questions. It is hard enough for one man to ask them. Don't ask me questions. Here is a 20-year-old engineer, you know.
A. I see you aren't. That is why it is hard to answer your questions.
Q. You answer my questions.
A. I will do the best I can, Mr. Spratt.
Q. Now, listen, did you ever know that there was a rule that you have a right before taking out an engine to see what the report was that was made by the engineer who last put that engine in?
A. I don't know of any such rule.

Q. Did you ever know of any such custom?
A. I can only answer your question from my experience.
Q. You can answer it by yes or no.

(Question read).

A. No, I did not.
Q. When you were ordered on the day in question to come there and take this engine out you didn't make any inquiry as to what the trouble was with that engine when she was turned in the last trip?
A. No, I did not.
Q. Now, is there a rule that engineers in turning in their engine after a trip have to make a report as to the condition of the engine?
A. Yes.

Q. And every time you brought your engine in you al-
142 ways made a report as to her condition, did you not?

A. If you had the engine out long enough——

Q. If you had the engine out on a run, when you came in, did you not always make a report as to the condition of the engine, and what repairs, if any, she needed?
A. That was the engineer's duty.
Q. That was his duty, and you always did that, did you not?
A. Yes, sir.
Q. And that was the practice here, was it?
A. The way I practiced it.
Q. Isn't that a rule that the company had in force, that an engineer must turn in his report?
A. That the engineer must make out a work report at the completion of a trip.
Q. As to what was needed on the engine?
A. Yes, sir.
Q. And so when you took this engine out you had a right to assume, did you not, that the engineer who last used it and turned her in had made a report as to the repairs that were needed on that engine?
A. Yes.
Q. Did you ask for that report before you took this engine out?
A. No, sir.
Q. When you went there you say that there were two men working at the piston rod on the left-hand side of the engine?
A. Yes, sir.

Q. Did you look to see what they were doing?
143 A. As I passed by the engine I see that they were working at the left piston rod, packing it.

Q. Packing the left piston rod?
A. Working at the packing.
Q. Did you have any talk with them?
A. I asked one fellow where the other fellow was, and he said he went over to get some packing.
Q. Were there two of them when you first came there?
A. I think there were.

Q. And where did you go after that?
A. After I first——
Q. After you first came to the engine what did you do there when you came?
A. I got up on the engine and put on my overalls and jumpers and my working clothes, and prepared to get the engine ready.
Q. Then where did you go?
A. Over to what they call the supply room for tools, and the like of that.
Q. When you came back was that the time that you missed one of the men who was working on the engine?
A. I think it was.
Q. After you brought your tools and supplies there what next did you do?
A. I had to make a couple of trips for them.
Q. After you got that what did you do?
A. These two men left there while I was making one of these trips.
Q. And when you came back did you see that they had apparently fixed the packing?
144 A. That they had apparently fixed the packing.
Q. Did you make any examination yourself to see what kind of a job they made?
A. You can't do it after——
Q. I say, did you? Answer yes or no.
A. No.
Q. Then what did you do after that?
A. Before I left the round house with the engine I inquired of Mr. Carroll if the engine was O. K. for service.
Q. That was the conversation you told here. What did he say?
A. He said yes, the engine was O. K. for service.
Q. That was the only talk you had with Mr. Carroll?
A. That day?
Q. That day. That was the only talk?
A. No.
Q. Then after you had this talk with Mr. Carroll what did you do?
A. Went out and got the engine and went to the yard.
Q. When did your fireman Sauer come there?
A. Well, I can't tell just the minute he come there. He got there so that I just skinned to the yard on time.

Mr. Spratt: I ask that that latter part be stricken out.
The Court: Strike it out.

Q. What time was it that Sauer came there? If you can give me the hour of the day I want to know it.
145 The Court: If you don't know say you don't know. You have not got to answer questions always; if you don't know or you don't remember you can say so.
A. Well, your Honor, it was sometime between twelve-thirty and one-thirty.

Q. That is as near as you can put it, is it?
A. Yes, sir.
Q. Did he arrive there before you had carried all the tools over to the engine?
A. I don't think he did.
Q. Was it after you had carried all the tools over to the engine and ready to start that Sauer came there?
A. I think it was, yes, sir.
Q. Did you put any oil on the packing or in the packing before you started?
A. I don't know how to answer your question.
Q. Just yes or no.
A. Well, you are asking me a question that I can't answer yes or no.
The Court: Then just say "I can't answer that question."
Q. You can't tell whether you put any oil on the packing before you started or not? That is what you say?
A. Your Honor says I have the right to say I can't answer that question?
The Court: Yes, you can say that.
Mr. Spratt: All right, if you say you can't answer it.
The Court: You see the rule is like this: You are under
146 cross examination, and the law imposes upon you the duty of answering the questions of the counsel who is cross examining you just as they are put. If you can't answer them you may say "I can't answer that question" or "I don't know," or "I can't remember."
The Witness: But, your Honor, I could answer his question——
The Court: If he would put it in a way to suit you?
The Witness: No, if you will allow me to explain.
The Court: You can't do that. You will get that opportunity later on by your own counsel, who will just make a note of it, and allow you to explain, but on cross examination you must answer the questions just as they are put to you, or if you can't answer say that you can't.
The Witness: He is asking me a question which in my judgment is physically impossible——
The Court: I am just instructing you as to the rule of law which governs the cross examination of a witness.
The Witness: Thank you, your Honor.
The Court: Just answer as best you can, and we will get along more rapidly.

By Mr. Spratt:

Q. Did you do anything to the engine at all before you started?
A. Yes, sir.
Q. What did you do to it?
147 A. I looked it over, filled the lubricator with oil.
Q. Anything else?
A. And cleaned out the oil cups.
Q. Anything else?

A. I put oil in them.
Q. Anything further.
A. I told you I cleaned out the oil cups.
Q. I say, anything else? You have told us one.
A. Took water in, see that she had supplies, and went to the yard.
Q. I meant before you started. Before you started the engine at all, I am asking you. Have you told all that you did to the engine before you started?
A. Yes, sir.
Q. Did Sauer usually do anything to the engine before you started?
A. He might have examined the oil parts and the markers. I couldn't say.
Q. I only want you to say what you know.

The Court: If you don't remember say you don't remember. That is easy.

A. I don't remember.
Q. Was steam up on the engine when you came there?
A. I can't answer your question.
Q. You did generate steam before you started?
A. Some.
Q. How much steam did you have on the boiler before you started?
A. About one hundred pounds.
148 Q. How much was she entitled to carry?
A. 200 pounds.
Q. Now, of the one hundred pounds you said that she was leaking before you started.
A. Yes, sir.
Q. Where was she leaking before you started?
A. Leaking water at the belly of the boiler.
Q. Whereabouts on the belly of the boiler?
A. Around the washout plug and the seam between the first belly brace back of the saddle, and the saddle.
Q. Where is the saddle?
A. The saddle is what the front end of the boiler rests on.
Q. It is about where the pistons work, is it? About opposite to where the pistons are?
A. You are asking me to tell where.
Q. You described it as an engineer. Now, I am asking you as a layman, so that we may know just where this leak was. You say it was back of the saddle?
A. Yes, back towards the cab, toward the saddle.
Q. The saddle is where the front end of the boiler rests, is it?
A. Yes, sir.
Q. And that would be about how far in front of where you sat?
A. About 25 foot.
Q. And was that the water or the steam that leaked there?
149 A. With one hundred pounds pressure it was more water than steam.
Q. But did this afterward become the point where you say the steam did escape?

A. Steam escaped from there, yes, sir.

Q. That is the first leak where you say there was steam. Where was the next place that there was any steam?

A. Steam from the left piston-rod.

Q. And that was at the front end of the boiler? Its location would be at the front end of the boiler, would it not?

A. The back end of the left cylinder.

Q. Isn't that near the front end of the boiler, the front end of the engine?

A. Yes, it is near the front end.

Q. And on the left-hand side?

A. Yes, sir.

Q. That would be the side away from you?

A. Yes, sir.

Q. That is the side that the men were repairing—these two men were repairing when you went there.

A. Yes, sir.

Q. Where else was there any leak?

A. At the unions of the steam pipes and the injectors.

Q. Where on the engine is the union of the steam pipe and the injector?

A. Well, there is several of them. Where the steam pipe connects——

Q. Where this was leaking? Tell me in what part of the engine that was.

150 A. Under the running board of the cab, down in under the cab there is a steam pipe from the boiler connects onto the injector.

Q. And that is under the running board?

A. Yes, sir.

Q. And that was in front of where you sat or behind where you sat?

A. It was in under .

Q. Right under where you sat?

A. Practically so.

Q. Where else was there any leak?

A. The throttles in the cab.

Q. Was that in front of you or was it above you?

A. Above and in front.

Q. How much above where you sat was the leak?

A. It would be about—say, about four foot in front of me.

Q. I am asking you how high above your head was this leak?

A. About how high above my head?

Q. It is above your head, you stated?

A. When you are sitting down or when you are standing up. It is about even with your head.

Q. When you were sitting in your usual position as you were when you were driving this engine, how high above your head was this leak?

A. Two or three feet.

Q. Was there any other leak now besides those you have mentioned?

A. Why, she was leaking some in the firebox.

151 Q. That is, within the box?

A. Yes, sir.

Q. That steam of course escaped out through the smoke stack?

A. Yes, sir.

Q. So that the steam that you said escaped outside of going out the smoke stack in the regular way, was it these three points that you have given me, first, in the belly of the boiler, second, where the steam pipes connect, the union underneath, about underneath where you sat, and the third was in the cab about three feet above where you sat?

A. You know that is on each side, them unions to the injector pipes are on each side of the cab.

Q. Did you see that they were leaking on both sides? That they leaked on both sides of the cabs?

A. Those in under the cab were.

Mr. Ward: May I ask what time you are speaking of?

Mr. Spratt: Before he started up. When he started up.

Q. Those were leaking on both sides of the cab, were they?

A. Some.

Q. You saw them, did you?

A. Yes, sir.

Q. At that time you only had one hundred pounds pressure on your boiler?

A. Yes, sir.

Q. And the ordinary amount when you were running and hauling trains ran up to 200 pounds?

152 A. Yes, sir.

Q. Now, when you get up to 200 pounds the pressure becomes greater, doesn't it?

A. Yes, sir.

Q. And more steam would escape from those points than there would when it was at 100 pounds pressure, would it not?

A. I can't answer your question.

Q. You can't answer that question?

A. No, sir.

Q. Do you mean to say that after your experience of 20 years with an engine that more steam will not escape when the pressure becomes twice as great?

A. I said I could not answer your question as you put it.

Q. You can't answer that question as I put it?

A. Yes, sir.

Q. So that when you started out, you didn't know, although you had had 20 years experience, that the pressure of the steam—there would be an increased amount of steam when you put the pressure on, coming out with that engine, did you?

A. I said I could not answer your question.

Q. And you can't answer this last question that I put to you.

A. As I understood, it is the same question.

Q. Well, it was a little amplified, so if there was any question I wanted to give you the benefit of the doubt.

153 Mr. Ward: If you want to give him the benefit of the doubt let him answer it in his own way.

Mr. Spratt: If he has any objection, I ask that it be recorded in the proper way.

The Court: Yes.

Q. When you took this engine out, before you started out, while the engine stood there, you could see all these things, couldn't you, with reference to the escaping steam?

A. Yes, sir.

Q. And when you took her out you knew her condition, that this was her condition, did you not? When you started out with her you knew that was her condition?

A. I couldn't tell—yes——

Q. As you have described it here?

A. At the time of leaving the roundhouse I knew her condition.

Q. How many men were usually employed at the roundhouse there that you took this engine from?

A. I can't answer your question.

Q. Well, a couple of hundred men around there, isn't there, in one capacity and another, repairing engines?

A. You just cautioned me on guess work. I would have to guess at it. I couldn't tell you——

The Court: Then your answer is "I don't know."

Q. Would you say there were 50 men working around there at the roundhouse where you took this engine?

A. I don't know.

154 Q. Were there 25 men working around there usually?

A. I don't know.

Q. Were there 10 men working around there usually on the engines?

A. I don't know that.

Q. Were there five men working around there usually on those engines?

A. Mr. Spratt, it is only guess work. If you want me to guess——

Q. How often did you run into that engine house? How often were you accustomed to go there?

A. I don't know how to answer your question. Every time I was called there.

Q. About how often was that?

A. I couldn't tell you. Sometimes I went into what they call the old New York Central house, and sometimes into the West Shore.

Q. I am talking about this engine house that you took this engine from at this time. What do you call that? Is that the old——

A. That is the West Shore roundhouse.

Q. How often were you accustomed to go to this roundhouse?
A. I would have to guess at it. I couldn't tell you. I made no record of it.
Q. You made no record?
A. Why no.
Q. Is your memory as good on that point as it is on the other things you have testified to on the trial?
A. I don't know if it is good on that.
155 Q. How many stalls were there in this roundhouse?
A. I don't know.
Q. How often do you think you had taken your engine in and out of that roundhouse in the year previous to the time of this accident?
A. I don't believe the roundhouse was in operation a year previous to that accident.
Q. How many times previous to this accident had you taken that engine in or out of that roundhouse?
A. I don't know.
Q. Did you take them in as often as twice a week?
A. I don't know that.
Q. Did you take them in as often as once a week?
A. I couldn't say that it would average that.
Q. What is that?
A. I couldn't say that it would average that.
Q. Would you say you took them in as often as once a month?
A. I don't know.
Q. How far was the house that you lived from this roundhouse?
A. About ten minutes walk for me at that time.
Q. How frequently had you been there, either going to or from your engine?
A. I had been there several times without going to or from the engine.
Q. So that you had a chance to look at this roundhouse?
156 A. Yes, sir.
Q. How many times did you have an opportunity to see this roundhouse?
A. I could see it from the house.
Q. And yet you can't tell me about how many stalls were in there?
A. No, I couldn't tell you definitely, positively, how many stalls were in there.
Q. I don't ask you positively. I ask your best judgment, your best recollection.
A. I don't know, I don't remember that I ever counted.
Q. I asked you if you would give me your best recollection of how many stalls there were there?
A. I should say about 30.
Q. It was a large engine house, wasn't it, a large roundhouse?
A. I can't answer your question, Mr. Spratt.
Q. Well, you have seen a good many roundhouses, haven't you, along the New York Central?
A. Yes, but your opinion and my opinion differ——
Q. I am asking your opinion.

The Court: Just answer his questions the best you can under that rule that I have already laid before you.

The Witness: Your Honor, I will do so.

Q. You have been in the roundhouse of the New York Central at Rochester, haven't you?

A. Yes.

Q. And Syracuse?

A. Yes, sir.

157 Q. Where else—Niagara Falls?

A. Yes.

Q. And this was a very new roundhouse, wasn't it?

A. Yes.

Q. A very modern roundhouse at that time?

A. Yes.

Q. And they had a machine shop connected with it or something where repairs were made, the ordinary running repairs?

A. Yes, sir.

Q. Haven't you seen a large number of men around there working on engines?

A. I have seen a working force around there.

Q. After you saw the condition of this engine and the steam escaping at all the points that you have described, did you go to Mr. Carroll, or to anyone in charge there and complain about the condition of the engine?

A. No.

Q. Did you request anybody to give you another engine to take out on the road in place of the one designated?

A. No.

Q. Under the rules you had a right to demand another engine, did you not?

A. No, sir.

Q. What is that?

A. No, sir.

Q. You never knew there was any rule to that effect?

A. I never did.

Q. Never heard it?

A. Never did.

158 Q. And your memory is just as good now as it has been on any of the previous trials on that point, is it?

A. It might be getting wore off some on some points.

Q. And you started off with this engine in that condition that you have described?

A. Yes, sir.

Q. And you went from there where?

A. From the West Shore roundhouse to caboose track 20 in the north yard.

Q. And there you got the balance of the train crew?

A. I got the train crew there.

Q. Your fireman and you were on the engine?

A. Yes, sir.

Q. And then you got Mullen and Boyle and the conductor on the caboose?
A. Yes, sir.
Q. And then when you got the caboose you started where?
A. For what they call the shop yard.
Q. And there you got either two flangers or a finger and a snow plow?
A. Yes, sir.
Q. You took that to Tonawanda?
A. Yes, sir.
Q. As you went on down to Tonawanda how was the engine, was she leaking just as she was when you took her out?
A. About the same as when I took her from the roundhouse.
Q. When you got to Tonawanda you left these cars that
159 you took down at the Tonawanda yard?
A. Yes, sir.
Q. Then you came back to East Buffalo near where you got this engine?
A. No.
Q. Where did you come then?
A. We come in what they call around the north yard.
Q. Around the north yard?
A. Yes, sir.
Q. How far was that from any engine house?
A. Right by the old engine house.
Q. You went by the old engine house.
A. The old engine house, yes, sir.
Q. How near to the old engine house?
A. A distance about across this room.
Q. And did you report to anybody the condition of the engine when you returned from Tonawanda?
A. No, sir.
Q. You were told when you got back there to the yard what to do?
A. Yes, sir.
Q. What did they tell you to do?
A. To get a coal train out of the depot yard for Black Rock.
Q. And you went and attached your engine to that train, those cars?
A. We went down there and coupled onto the train.
Q. And you started for Black Rock with that train?
160 A. Yes, sir.
Q. At the time you started you knew the condition of your engine?
A. Yes, sir.
Q. How many cars were there on that train?
A. I haven't any—I can't answer it only to guess at it.
Q. Give me your best judgment as to the number?
A. About 35 cars.
Q. And did that require a greater application of a greater amount of steam in drawing those cars than it did to draw the two cars that you took to Tonawanda?

A. Yes, sir, up grade.

Q. Didn't it require a greater amount of steam anywhere except on down grade to draw them?

A. Yes.

Q. They were loaded with coal, were they not?

A. I couldn't tell what they were loaded with.

Q. When you began to draw those cars you had how much pressure on your engine?

A. I don't remember exactly now.

Q. Give us your best recollection.

A. It might have been 180 or 190.

Q. When the engine began to work with that pressure and began to draw those cars, was there more steam escaping from the boiler at the places that you have described as leaking when you started out the first thing?

A. You are speaking of the leaks in general?

161 Q. Yes.

A. Yes.

Q. How much more steam was escaping when you were drawing that train than when you started out, than when you took the engine in the afternoon? How much more steam? Was it doubled?

A. I can't answer that question.

Q. Can you give the jury any idea at all about it?

A. I don't know of any method of measuring steam.

Q. Just by volumes?

A. It was leaking quite a bit worse going up Genesee street than it was leaving the yard.

Q. It kept getting worse, did it?

A. Yes, sir.

Q. And the more pressure you put on, and the harder you drew, the more steam escaped? Is that right?

A. Now, you are right back to the question that I couldn't understand you on before.

Q. I am putting it to you in a different way.

A. I can't answer your question.

Q. Is it because it is not plain enough or is it because that question cannot be answered?

A. I think it is because you and I don't understand one another, Mr. Spratt. There is some leaks which pressure will dry up and others will leak greater.

Q. All right, we will take the first one. How was it with the place under the belly of the boiler? Did that steam increase after you put the increased pressure on the boiler than it was

162 when you only had the one hundred pounds on?

A. You can't see that leak from the cab. You have got to get down on the ground and examine it.

Q. No, I am asking you, did that increase in volume as you increased the amount of steam in your boiler?

A. I can't answer your question.

Q. You can't answer that?

A. No.

Q. Could you see that steam at any time that came out from under the belly of the boiler?

A. I couldn't separate that which came from the left piston rod.

Q. Could you see that steam at any time that came out from under the belly of the boiler?

A. No.

Q. You saw it though before you started?

A. I saw steam coming out of there, yes.

Q. You don't know how much came from the belly of the boiler at all, do you?

A. I couldn't tell you the volume, no.

Q. Before you started out I think you said it was water and steam combined that was coming out?

A. Yes, sir.

Q. So that there wasn't much coming out of the belly of the boiler?

A. Yes, quite considerable water coming out.

Q. But not much steam?

A. No——

Q. I say, but not much steam?

A. There was some steam.

163 Q. And after that you being in the cab never could see how much, if any, steam was coming from the belly of the boiler, could you, by itself?

A. Not exactly.

Q. Because it mingled or you think it mingled with the steam coming from the left piston?

A. Yes.

Q. Could you see the steam coming from the left piston at any time when you sat in your cab?

A. No.

Q. We get back to the steam that was coming from the pipes, you say, under where you sat. Did that steam that escaped increase in volume as you put the pressure on the engine?

A. Yes, sir.

Q. And how much steam came from that point?

A. I can't answer your question.

Q. You can't say?

A. No.

Q. You don't claim that that was the steam that obstructed your view?

A. No.

Q. It was the steam from the piston rod and the belly of the boiler, if any, that you claim obstructed your view of signals?

A. Yes, sir.

Q. The steam that came from in front of you, and about three feet above you, did that increase as the steam pressure increased?

A. Yes, sir.

Q. That didn't obstruct your view, did it?

164 A. No.

Q. That was above you? Now where did you leave these

cars that you brought over there? Did you leave some of them at the Pierce-Arrow plant?

A. I don't think the Pierce-Arrow plant was there at that time.

Q. You don't think the Pierce-Arrow plant was there in 1908?

A. I don't think it was.

Q. What?

A. Yes, it was too.

Q. How is your memory, anyway?

A. Not very good.

Q. Do you know whether you left any of the cars there at the Pierce-Arrow plant?

A. I think we left some on what they call the Elmwood siding, not at the Pierce plant.

Q. You were in on that siding, were you?

A. No.

Q. You just shunted the cars in? Is that it?

A. Yes, sir.

Q. Then you went on down to what point where you finally left your cars, the balance of them?

A. Where we finally left the cars?

Q. Yes.

A. On the Southern track.

Q. The southern track?

A. Yes.

Q. And that was in the south of Amherst street?

A. North.

165 Q. North of Amherst Street, and what side of the main New York Central tracks?

A. West side.

Q. And there you uncoupled your engine and then coupled onto your caboose, did you?

A. After we went down the other end of the train we coupled on the caboose.

Q. You first cut off your engine and then switched your engine around and coupled onto the caboose that was at the end of the train that you brought over? Is that right?

A. Yes, sir.

Q. About what time in the evening was that?

A. That was probably around 8:20.

Q. Was it dark?

A. Yes. Well, not so very dark on account of so many electric lights around that neighborhood.

Q. Do you know about what time the sun went down in October?

A. I couldn't tell you.

Q. And then your engine was coupled on with the cow catcher next to the caboose?

A. Yes, sir.

Mr. Ward: Here is the weather, temperature and direction of wind and so on, if you wanted to get that.

(Handing weather report to Mr. Spratt.)

Mr. Spratt: All right, counsel has suggested that I offer this in evidence, a report from the Weather Bureau here.

The Court: Do you want to read it?

166 Mr. Spratt: Yes.

The Court: Read it in evidence.

Mr. Spratt (reading): "Date, October 12th, 1908, temperature, maximum 50; minimum 36; mean 43. No precipitation, no snow on the ground, character of the day, clear. Wind south. Six p. m. to next a. m. 7 to 9 miles."

Q. Then after you got your caboose coupled on then you went over on the southerly Y track, did you?

A. The Belt Line track.

Q. Did you go over the southerly track of those two Belt Line tracks?

A. Yes, sir.

Q. And moved right on in a westerly direction until you got by Tower I?

A. Not exactly until we got by. We were about in front of the tower.

Q. About in front of Tower I?

A. Yes, sir.

Q. You had not crossed the Military Road?

A. The rear of the tender was standing right up there to the pavement on Military Road.

Q. And the two brakemen, Mullen and Boyle, went back to throw the switches?

A. Yes.

Q. And did they go east of the Military Road?

A. Yes, sir.

Q. Down here (indicating)? And they were to throw the
167 switches so as to let you in on this track, on the northerly track of the Y? Is that right? So that you would go with the current of traffic up to Tower 55?

A. Yes, sir.

Q. About how far from the Military Road were these switches they went down to throw?

A. I should say the nearest one to the engine would be about as far as across this room from wall to wall.

Q. About 40 to 50 feet? Give us your best estimate in feet? 50 feet, did you say?

A. Yes, all of that.

Q. While they were down there throwing those switches, and you were standing here, you had a conversation with the towerman in Tower I?

A. Yes, sir.

Q. And he told you that he could run you up with the current of traffic on the Y to tower 55, did he?

A. I think you misspoke yourself, Mr. Spratt.

Mr. Spratt: I will strike that out.

Q. What did he say to you?

A. He told me—he wanted to know why we didn't go on the track this way (indicating), that he already had permission for us to go up on that track. That would be going agin the current of traffic.

Q. You would be going with the current of traffic on that track with the Y, would you not (indicating)?

A. You have got your pointer up between the two of them.

168 Q. You point with the pointer which one he told you to go.

A. This one right up on this side (indicating). Not that one over there, but this one here (indicating).

Q. That would be against the current of traffic on the Y?

A. Yes, sir.

Q. And then what did you do after that?

A. I called to the two brakemen.

Q. What did you say to them?

A. "Close up the switches and come on," the towerman had permission for us to go on that track.

Q. Do you know which brakeman was nearest to you down here when they were changing those switches (indicating)?

A. Mullen.

Q. And so when he walked along up towards you he was—being nearer to you, he was the one that passed you?

A. Yes.

Q. And you saw him go past?

A. Yes.

Q. And saw him get on the caboose, didn't you?

A. Yes.

Q. And it was light enough so that you could see him do that?

A. Yes.

Q. And the steam didn't obstruct your view so much but what you were able to see Mullen go past you and go up and get up on the front end of the caboose?

169 A. Yes.

Q. And of course Boyle was behind Mullen and didn't reach the engine as quickly as Mullen reached the engine?

A. I don't know that he reached it at all.

Q. You couldn't tell one way or the other?

A. I couldn't——

Q. You didn't watch Boyle, did you?

A. No.

Q. You watched Mullen?

A. I watched Mullen.

Q. So that what became of Boyle after Mullen passed you, you don't personally know?

A. No.

Q. Now, after Mullen got on the front end of the caboose what happened, what was the next thing?

A. He gave me a come ahead signal, and we proceeded up towards Tower 55.

Q. Did he give you any other signals before you reached Hertel avenue?

A. I think he gave one when we was about to cross the Erie Railroad.

Q. That was just as you started, was it, or shortly after you started?

A. It was shortly after we started.

Q. And then what other one did he give you, if any, up to Hertel avenue?

A. I don't know that—I don't remember that he give us any as we was approaching Hertel avenue, getting onto Hertel avenue.

Q. There are street car tracks in Hertel avenue, are there not?

A. Yes, sir.

170 Q. Hertel avenue was a grade at that time, both across the Y and across the main track?

A. Yes, sir.

Q. And do you know that there was an ordinance compelling them to run slow across the streets of the City of Buffalo?

A. I know there was at one time.

Q. Wasn't there in 1908, at that time?

A. That was in and out. I couldn't remember whether——

Q. Don't you know it was your practice when you passed over Hertel avenue to run slow, to slow down to about eight miles an hour?

A. I don't think there was any ordinances required that slow.

Q. What was the ordinance of the City of Buffalo at that time? What speed was it they had to pass over Hertel avenue?

A. I couldn't tell positively now, for it was never impressed on my mind.

Q. When you were at Tower I could you see the dwarf, dwarf No. 6 that governed the movement of the track that you were proceeding there? That is up here, isn't it (indicating)?

A. Yes, sir.

Q. Could you see it?

A. From Tower I?

Q. Yes.

A. No.

Q. What prevented you from seeing it?

A. We were on a curve and sort of a bank there.

171 Juror No. 2: I don't just get that.

Mr. Spratt: Here (indicating) is Tower I, and here (indicating) is Hertel avenue, and here (indicating) is dwarf 6. I asked him when he started from Tower I was he able to see 6, and he said he wasn't and I asked him why, and he said because of an embankment there (indicating).

Q. What point did you get as you moved along up there that you could first see dwarf 6?

A. Along about between the words there "the" and "current," along in here.

Q. About where the words "the current" are on this map, Exhibit 1, is the point where you could first see dwarf signal 6?

A. Yes, sir.

Q. And what prevented you from seeing it up to that point, up on

the embankment there? Was there any building there? Did the Kam malt house interfere in any way?

A. The Kam malt house was away beyond that.

Q. Was there anything except the embankment that prevented you from seeing the dwarf?

A. There was a tool house in there, a section foreman's tool house.

Q. So that you got out to this point about the words "the current" before you could see the dwarf?

A. Yes, sir.

Q. And after that the dwarf was clear provided you didn't have any steam, provided there was no steam escaping? From
172 that point on the dwarf was in your view unless there was some temporary obstruction?

A. It would have been in my view unless there was some temporary obstruction.

Q. Had you run over that track a great many times, Mr. Kinney?

A. Yes, sir.

Q. And you knew the location of this dwarf signal?

A. Yes, sir.

Q. Knew it well?

A. Yes, sir.

Q. As you proceeded along and got across Hertel avenue was that in your view all the time, was this dwarf 6 in your view all the time?

A. No, it was not.

Q. Over what part of the track was it that this dwarf was in your view continuously?

A. What part was it in my view continuously?

Q. Yes.

A. Why, it was only a short space there around between the word "current" and——

Q. And Hertel?

A. Yes, sir.

Q. You saw it at that point?

A. Yes, it was there that I begun using steam, and after I begun using steam——

Q. Did you see it at that point?

A. I should judge that is the distance from Hertel avenue.

Q. That is the word—I point to the letter "u" in current? Is that about the point where you saw it?

173 A. It might have been this way further (indicating).

Q. How much further this way?

A. I couldn't tell you just to the foot.

Q. Well, give us approximately.

A. As I said before, between "the" and "current."

Q. In there, between those two words? That was the point where you first saw the dwarf?

A. Yes, sir.

Q. Did you see it at any time after that?

A. No.

Q. And that is the only view you had, and that is the only time you saw it?

A. Yes, sir.

Q. Now, as you proceeded along there, and after you crossed Hertel avenue, you saw Mr. Mullen's signal, did you not? You have described that you saw it?

A. Yes, sir.

Q. And about how far were you northerly of Hertel avenue when you saw this signal?

A. I saw it going onto Hertel avenue.

Q. And that was, you say, a come-ahead signal?

A. Yes, sir.

Q. You interpreted it as a come-ahead signal?

A. Yes, sir.

Q. Then where were you when you saw him give the next signal?

A. About between "of" and "traffic."

Q. What was that signal?

A. A come-ahead signal.

174 Q. Where were you when you saw him give the next signal?

A. I can't just say to a foot, because——

Q. Where were you when he gave the next signal?

A. To the best of my judgment it was up there by one of those arrows.

Q. By this arrow, the arrow right after the word "traffic" (indicating)? Is that the place?

A. About that.

Q. And you read that to be what?

A. A come-ahead signal.

Q. Where were you when you got the next signal?

A. I should say about opposite——

Q. There (indicating)?

A. Right there.

Q. That is, opposite No. 6?

A. Along about there. I got what I took to be a come-ahead signal.

Q. Where were you when you got the next signal?

A. I was at the point of the accident when I got the next signal.

Q. And what was that signal?

A. It looked to me like a come-ahead signal.

Q. But you stopped there, did you?

A. Yes.

Q. And it was the same kind of signal that he had been giving you all the time?

A. Not the same nature.

Q. How did it differ?

A. Smaller and more rapid.

175 Q. But the directions were the same?

A. The directions were the same.

(Recess until two o'clock p. m.)

After Recess—two o'clock p. m.

JOHN W. KINNEY, the plaintiff, resumed the stand for further Cross Examination:

By Mr. Spratt:

Q. By "smaller" you mean it was not such a wide swing from the body out?
A. Yes.
Q. And it was more rapid?
A. Yes.
Q. But the characteristics of the signals were the same at all times?
A. Yes, sir.
Q. When you got the directions from the towerman down here at Tower I to move towards Tower 55, that gave you the right to go as far as the dwarf signal 6, did it not?
A. Yes.
Q. And when you came to dwarf signal 6 you would have to be governed by the color of that signal?
A. And Mullen's signal.
Q. If the dwarf was against you or at purple, and Mullen was giving you the signals to come ahead, as you claimed he was doing, what would have been your duty under such circumstances?
176 A. To proceed on Mullen's signal.
Q. To proceed on Mullen's signals?
A. Yes.
Q. Even though the dwarf was against you?
A. Not if——
Q. Just listen to my question.

(Question read as follows:

"Q. Even though the dwarf was against you.")

Is that right?
A. Yes, sir.
Q. So that you would pay no attention to the dwarf?
A. No.
Q. And that is what you did at the time in question, isn't it? You went ahead on Mullen's signal, and paid no attention to the dwarf signal?
A. No particular attention.
Q. You paid no attention to it, did you? You paid no attention to the dwarf signal, did you?
A. I paid no particular attention to it.
Q. What do you mean by paying no particular attention?
A. I didn't look at the dwarf entirely and hold Mullen's signal regardless—that is, I didn't pay any attention to Mullen's signal and look for the dwarf.
Q. You didn't pay any attention——

A. I didn't pay no attention to Mullen's signal.

Q. You didn't pay any attention to Mullen's signal? Is that what you say?

A. I guess you are misunderstanding me.

The Court: What do you intend to say?

177 A. I paid more attention to Mullen's signal than I paid to the dwarf.

Q. Did you pay any attention to the dwarf signal at all after you saw it at the point you described before you passed Hertel avenue between the words "the" and "current?"

A. No particular attention.

Q. Did you pay any attention to it?

A. No, sir.

Q. So that you relied wholly on Mullen, did you?

A. Yes, sir.

Q. Isn't it a rule that you should always observe signals and observe them up to the time that you reach and pass them?

A. I don't remember any.

Q. You don't remember any such rule?

A. No.

Q. Did you ever testify that there was such a rule?

A. I don't remember that I have.

Q. You don't remember that you had or you don't remember either way? Is that it?

A. I don't think I ever did.

Q. I think you testified you had a right after you got the direction to run on this track, you had a right to run up as far as the signal?

A. Yes, sir.

Q. And there you would get further direction according to that signal, would you not?

A. Yes, sir.

Q. Now, the operator of the signal, the tower man, has a right to change that signal, hasn't he, any time, before you reach the signal?

178 A. Yes, sir.

Q. And that is frequently done, isn't it, in practice?

A. Sometimes it is done.

Q. Conditions make it necessary to change?

A. Yes, sir.

Q. And you have known it to be done?

A. Yes, sir.

Q. And on the occasion in question when you came up there you didn't know but what that signal, assuming that you saw it green, might be changed to danger before you passed it?

A. It might be changed to danger.

Q. You knew that?

A. Yes, sir.

Q. Now, when you came up there, you knew that before passing the signal you were about where the signal was, did you not?

A. That I was in the neighborhood of that signal, yes.

Q. And did you know when you passed it?

A. I couldn't tell exactly, no.

Q. Did you think you had passed it before the accident?
A. I didn't think that I had.
Q. You didn't think you had?
A. No, sir.
Q. What prevented you from seeing this dwarf signal?
A. The steam from the engine.
Q. Where did the steam from the engine come? What prevented you from seeing the dwarf signal?
A. The steam from the engine.
179 Q. Whereabouts from the engine did the steam come?
A. It come through in under the boiler.
Q. That was the steam?
A. Yes, sir.
Q. You told me you didn't know how much came from the boiler, itself, didn't you?
A. Yes, sir.
Q. It was the steam from the cylinder, wasn't it?
A. I suppose it was.
Q. From the piston?
A. From the piston rod and the boiler.
Q. Did most of it come from the piston rod?
A. Some of it come from the piston rod.
Q. And you don't know much came from the boiler?
A. No, I couldn't say.
Q. And that was the steam that obstructed your view?
A. Yes, sir.
Q. And that you say came up from under and came up against the running board?
A. Out from under the edge of the running board.
Q. Where does the running board extend from?
A. From the front of the cab very near to the saddle.
Q. And that is nearly to the front end of the engine?
A. Yes, sir.
Q. What part of the running board did this steam come up from?
180 A. The underside of it.
Q. And how near the front end of the engine?
A. Well, from——
Q. How near to the saddle?
A. About a couple of feet from the saddle.
Q. Forward or back from the saddle? Towards the front end of the engine or towards the hind end?
A. Towards the hind end.
Q. The piston—that is ahead of the saddle, isn't it? Is the steam chest where the piston works where this steam was coming out forward of the saddle?
A. No, sir.
Q. Behind the saddle, isn't it?
A. Yes, sir.
Q. The steam from the pistons, it is let into the pistons in what way?

A. By a throttle.
Q. And you had control of the throttle in your engine?
A. Yes, sir.
Q. So that you could stop the steam—when you got up there or near there you could stop the steam coming from the piston and the steam chest by shutting off the steam with your throttle lever, couldn't you?
A. By stopping the engine, yes, sir.

Mr. Spratt: I ask to strike that out.
The Court: Strike it out.
Mr. Spratt: The latter part?
The Court: Yes.

Q. You could stop the steam that was going out of the
181 steam chest and by way of the piston by shutting off the lever, closing it down, couldn't you?
A. Yes.
Q. And all the steam that came out of the piston could be stopped in that way?
A. Yes, sir.
Q. And your engine could drift along with this speed that you had, six or seven miles, could it not?
A. No, sir.
Q. Wouldn't there be any drift to your engine when you were running at six or seven miles an hour?
A. Very little.
Q. There would be some, wouldn't there?
A. Very little.
Q. There would be some, would there not?
The Court: Yes or no.
A. Yes.
Q. And did you do that?
A. No, sir.
Q. If there was any doubt about your seeing, not being able to see the dwarf one way or the other, you could have stopped your engine, could you not?
A. Yes, sir.
Q. And did you do that?
A. No, sir.
Q. Now, you say that you had more steam in front of you at the point near where the 6 was, dwarf 6, than you had down near Military road or Hertel avenue?
182 A. Yes, sir.
Q. Now, did you hear read in the testimony here the report of the Weather Bureau of Buffalo as to the condition of the wind that night?
A. Yes, sir.
Q. It was from the south?
A. Yes, sir.
Q. Now, as you came along here (indicating) between Tower I and towards Hertel avenue, if the wind was from the south it would

be blowing the steam more over onto the right-hand side where you were, would it not, more than when you got down here further north (indicating)?

A. Yes, sir.

Q. And when you got down here towards No. 6, dwarf signal No. 6, the tracks at that point were running more nearly north, were they not, than they were at any other place?

A. Yes.

Q. Then if the wind was coming directly from the south at that place, No. 6, instead of carrying the steam which was escaping towards the front end of the engine, instead of carrying it under, wouldn't it have carried it forward in the direction the engine was going?

A. No, sir.

Q. It would not?

A. No, sir.

Q. Even though the wind was blowing in the same direction that you were going? If the wind was coming from the south that wouldn't blow the steam from under your engine across, would it?

A. Yes.

183 Q. It would?

A. Yes.

Q. It wouldn't carry the steam the same direction the wind is going?

Mr. Ward: You are forgetting the engine is moving about the same rate the wind is.

Q. Wouldn't it carry it away? You weren't running any faster than the wind?

A. No, about the same rate of speed.

Q. You said you were traveling from six to seven miles an hour?

A. Yes.

Q. And the wind was from seven to nine miles an hour?

A. Yes.

Q. Isn't that the fact?

A. Yes, sir.

Q. So that carrying it that way, it would not have carried it across the engine, but it would have carried it in the direction the engine was going, would it not?

A. The engine wasn't going north.

Q. Wasn't it going nearly north at the point when it reached No. 6?

A. I should say it was going northwest.

Q. This map is correct, isn't it, this map in evidence?

A. I should say it was correct.

Q. And do you say under those conditions, the conditions of the wind, and the direction you were going, that that wind blew the steam cross-wise of your engine, and to the right of your engine?

184 A. No, I don't mean to say that it blowed crossways.

Q. What do you mean to say then?

A. I mean to say that it blowed it angly across the engine, and then trailing along with the engine.

Q. Where it leaked from the piston, and where this escaped steam was from the belly of the engine, that was about 25 feet further towards the end from where you sat?

A. Yes, sir.

Q. So that when you got up to this dwarf six the steam that was escaping from the engine, the place on the engine was 25 feet or so in front of you?

A. Yes, sir.

Q. Under those conditions there wasn't any trouble for you to see the dwarf, was there?

A. Yes, sir.

Q. You swear there was?

A. Yes, sir.

Q. You could see Mr. Mullen, could you? You could see the signals that Mr. Mullen was giving?

A. Yes, sir.

Q. How high is the running board of an engine above the rail? How high was the running board of this engine above the rail?

A. At a rough estimate, about six feet.

Q. About six feet?

A. Yes, sir.

Q. How high is the platform of an ordinary caboose above the rail?

A. I should judge about four foot.

Q. You understood that Mullen was standing on the platform?

185 A. Yes, sir.

Q. So that there wouldn't be much difference in the height of Mullen's signals that you have described above the rail and the height of the running board above the rail, would you?

A. Yes, there would be some difference.

Q. Now, isn't it a fact that if the steam obstructed your view, as you claim, of the dwarf 6, that that same steam intervened between you and the signals Mullen was giving?

A. No, sir.

Q. You swear that it was not?

A. Yes.

Q. And do you claim, Mr. Kinney, that the steam as it came out from the side of your engine as you were going between Hertel avenue and the point of the accident, did it rise up?

A. Yes, sir.

Q. From the ground—or from the belly of the engine?

A. Yes.

Q. How high up did it raise?

A. As high as the running board.

Q. Did it come up above the running board at all?

A. Not perpendicular.

Q. Spread around, so that it did come up above the running board?

A. Yes, sir.
Q. Was that the only place where you had ever noticed it coming up and enveloping you or enveloping your engine?
A. Yes.
186 Q. Was that the only place where it had ever bothered you that day before so that you could not see signals?
A. Yes, sir.
Q. Your memory is good on that, is it, on that point?
A. I think it is.
Q. Now, just one question. How high did you say that dwarf was from the ground?
A. I should say it was about two foot.
Q. About two foot?
A. Yes, sir.
Q. Only 24 inches?
A. That is what I should say.
Q. Did you ever measure it?
A. No, sir.
Q. On the third trial, Mr. Kinney, did you testify as follows, page 271.
"Q. You got into the shop yard, and then what train did you take?
A. I think it was a snow flanger and snow plow to North Tonawanda.
Q. You crossed back over the main line track again?
A. Yes, sir.
Q. And got on to the Belt Line at what point?
A. At William street." Did you testify to that?
A. Yes, sir.
Q. Did you further testify:
"Q. In making that movement you passed a good many dwarf signals?
A. I don't think we did.
Q. High signals altogether in crossing?
A. I think excepting two." Did you testify to that?
A. Yes.
Q. "Q. What is that?
A. Well, excepting two dwarf signals.
Q. You had two dwarfs at least?
A. I think we did.
187 Q. Did you have any trouble observing them because of steam?
A. Yes, sir." Did you testify to that?
A. Yes, sir.
Q. So that you did, when you started out in the forenoon, have trouble observing two dwarfs on account of the steam from this engine? That is right, isn't it? You testified to that, didn't you?
A. Yes, sir.
Q. And is that true?
A. Yes, sir.

Q. Now, on the fifth trial, you denied, did you not, that you had had trouble in observing on account of the steam?

A. I might have.

Q. And wasn't this question asked you, page 310?

"Q. Well, let me show you this testimony. Just read this and see if it refreshes your memory." (Witness refers to transcript of testimony.) Does that refresh your memory? Do you remember of being asked this question? "Do you remember that incident on the trial? Do you remember that happening on the trial, the last trial?"

A. No.

Q. And you were asked this question.

"Q. You had two dwarfs at least? That is the question.

A. I think we did."

A. Yes.

Q. Did you have any trouble observing them because of steam?" Did you answer "Yes, sir."? Is that correct?

A. Yes, sir.

Q. "Q. Did you testify to that?

A. It seems so there."

188 Mr. Ward: That is just what he said now. How is that any correction?

Mr. Spratt: I don't think we need any comments.

Mr. Ward: Well, I object to it, unless it is a contradiction of the witness.

The Court: Let us proceed. It is cross-examination.

Mr. Spratt: I can understand how you want to break the force of it, contradictory statements, denying it twice, and admitting it twice.

Q. So that you did have trouble as soon as you started out in the day time with this engine of seeing dwarfs on account of the steam, did you not?

A. No, sir.

Q. Is what you testified there then not true?

A. Yes, sir.

Q. It is not true?

A. It is true, but your question is not in conformity to that there.

Q. All right, I will leave that to the jury, you testified this forenoon, or yesterday afternoon, either one, that Mr. Carroll told you that the engine had been repaired and was all right, and that you took it out on his say so.

A. Yes, sir.

Q. Is that true?

A. Yes, sir.

Q. And that was after the repairs had been made on the engine?

A. He said that the repairs had been made on the engine.

189 Q. I call your attention to page 260 of the last trial:

"Q. And what did you see on the blackboard?

A. 'Engine 2499, John W. Kinney and Fireman Sauer, for Suspension Bridge job.'

Q. Had you run with Fireman Sauer before?

A. No, sir.
Q. He was a stranger to you?
A. Yes, sir.
Q. Then what did you do?
A. I started out to look the engine up, and I run across Mr. Carroll and asked him if he could tell me where I could find the engine. He said she was out on the storage track, alongside of the dump pit." Is that right?
A. Yes, sir.
Q. "Q. That is what he said to you?
A. Yes.
Q. And what did you do?
A. I went out and looked the engine over, and see if the fireman was there, and I found two men working on it.
Q. Where were they working?
A. They were working around the left piston rod." Is that true?
A. Yes, sir.
Q. "Q. Then what did you do?
A. I took the oil cans and went back over the oil room to get the oil, and on the way I asked Mr. Carroll how much work there was to be done on that engine.
Q. What did he tell you?
A. He told me when them two men that was working on it got through that the engine was O. K. for service." Is that correct?
A. Yes, sir.
Q. "Q. And did you see Mr. Carroll again before you went out?
A. Sir?
Q. Did you see Mr. Carroll again before you went out?
190 A. I don't recall that I did." Is that true? You testified to that?
A. I said I didn't recall that I did on that trial.
Q. And you didn't?
A. Yes, sir.
Q. So that this talk you had with Mr. Carroll was before the packing had been repaired?
A. No.
Q. Was that true as you stated it there?
A. I said I believed that it had, but I was mistaken there.
Q. Did you correct it during the trial?
A. Sir?
Q. When did you ascertain you were mistaken?
A. As I had been thinking it over. I made two trips to the supply room.
Q. You have been thinking it over.? This time you testified about it was the fifth trial, wasn't it, the last trial?
A. I don't know what trial it was, I am sure.
Q. You had been thinking it over a long time before you testified to that, had you not?
A. No, sir.
Q. You hadn't?
A. I would like to have you read my answer.

Q. Just answer my question. You hadn't been thinking it over, this incident of Mr. Carroll, a long time before the fifth trial?
A. Did you say I had or hadn't?
Q. I say, do you state that you hadn't thought over that before the trial, the fifth trial?
A. No, I hadn't.
191 Q. It was all new to you, then, at the time of the fifth trial, this conversation you had with Mr. Carroll? Is that true?
A. No, it was not new to me.
Q. Then you had thought it over before the fifth trial?
A. I don't know as I had thought it over.
Q. You did know of it before the fifth trial, the talk that you had with Carroll?
A. Yes, sir.
Q. And you knew of it before you testified here on the fifth trial?
A. Yes, sir.
Q. Didn't you testify to the same thing on the second trial that I have read to you here?
A. I don't think I did.
Q. Well, I show it to you on page 91. (Showing record to witness.)
"Q. Did you ask Mr. Carroll about the condition of the engine before you went out?
A. Yes, sir." Is that right?
A. Yes, sir.
Q. "A. I found Mr. Carroll on -he West Shore round house.
Q. What was his place?
A. He was general round house foreman.
Q. What did you say to Mr. Carroll?
A. I asked him if engine 2499 was O. K. for service." Is that right?
A. Yes, sir.
Q. "Q. What did Mr. Carroll say to you?
A. He said it was as soon as those two men got through with that out there." Is that right?
A. Yes, sir.
192 Q. "Q. Did you have any subsequent talk with him?
A. With Mr. Carroll?
Q. Did you have any further talk with him after that?
A. No, sir." Is that right?
A. Yes, sir.
Q. "Q. How did you know that the men got through with it then?
A. Why, they told me that they were through.
Q. And then did you get on your engine?
A. Yes, sir." Is that correct?
A. Yes, sir.
Q. So that you didn't have any talk——

Mr. Ward: Ask the next question. Be fair.
Mr. Spratt: You can put in anything.

Mr. Ward: You see what he says the next two questions. You are too big a lawyer to——

Mr. Spratt: I will read it as a courtesy to you.

"Q. Or did you find out from Carroll whether or not they had done their work?"

Q. Did you *you* have any further inquiries of Mr. Carroll or Mr. Kinne?

The Court: Did you have any further talk with Mr. Carroll?

A. Yes, sir.

Mr. Ward: The first question that I asked him.

Mr. Spratt: I will read it for you. (Reading.)

"Mr. Ward (resuming):

Q. What was that?

A. I asked him if that engine was all right?

Q. What did he say?

A. He said it was."

193 Q. So that you testified both ways, didn't you?

A. Yes, sir.

Q. And left it to the jury to take their choice? Is that right?

Mr. Ward: Now, I don't think that is a proper characterization.

The Court: No, it is not proper because the jury are to consider all of the testimony here in making their determination.

Q. You testified here this forenoon, did you not, that when you came back, and before you took the engine, you found only one of the men who was doing the repairs there—the other man had gone——

A. I testified this forenoon or yesterday that at one time I found only one man there.

Q. Didn't you say you only found one man there at the time you finally took the engine?

A. I can't answer your question because——

Q. And he was the one that told you that the repairs were finished?

A. I don't remember giving any such testimony.

Q. You don't remember?

A. No, sir.

Q. You did testify on the other trial, on the second trial: "Q. How did you know that the men got through with it then?" and did you answer, "Why, they told me that they were through."?

A. Yes, sir.

194 Q. So that there were two men there at that time when they told you they had finished the work?

A. Yes, sir.

Q. You testified this morning that you had never looked at any reports that had been turned in by engineers who had the engine out previous to the time that you took it, and that you didn't know there was any such custom? Is that so?

A. Yes, sir.

Q. I call your attention to your testimony on the second trial, on pages 92 and 93: "Q. What did you know about the custom or rule permitting an engineer to look over the report with respect to the enginer who had run a day or two immediately preceding the time you took it? A. I don't know of any objection if the report could be found. I did do it when I could find the reports. There were times when I could not find them. On this occasion I couldn't find them." Is that right?

A. Yes, sir.

Q. That is true?

A. Yes.

Q. So that you did know that there were reports made that engineers could examine?

Mr. Ward: Certainly, he made them himself.

Mr. Spratt: I object to Mr. Ward talking to the jury.

The Court: No, except by objections.

Mr. Ward: That is right. I beg your pardon, Mr. Spratt.

The Court: If there are any corrections they can be made
195 later. I will give both of your all proper latitude.

Mr. Ward: I meant to object to Mr. Spratt's question instead of addressing him directly, which I should not have done.

Q. You had looked at reports of engineers who had run engines previous to the day you took them?

A. I had looked in a drawer in the register room.

Q. You did know that it was the custom to do that?

A. No, I didn't.

Q. You know that it was done by engineers?

A. I don't know what the other engineers done.

Q. Do you know what you did?

A. I know what I have tried to do.

Q. You have at times done it, haven't you?

A. Looked in the drawer in the register room.

Q. And looked for their reports?

A. Yes.

Q. And on this occasion you did look, did you?

A. I couldn't say positively now whether I did or not.

Q. You testified this forenoon that you did not look, did you not? Did you testify this forenoon you didn't look for that reprt?

A. I might have.

Q. And you testified here on the second trial: "On this occasion I could not find it."? You testified to that, didn't you, on your second trial?

A. I don't remember positively. If it is in there I must have.

196 Q. Is it true? If you testified to it then is it true?

A. Yes, sir.

Q. Mr. Carroll was the general foreman there, wasn't he?

A. Day times, yes, sir.

Q. He didn't look after these repairs himself, did he, or inspect the engines?

A. He was the man that had charge of the men at the round house.

Q. He was in general charge there, wasn't he?

A. Yes, sir.

Q. And there were several departments under him, weren't there?

A. I should imagine there was, yes, sir.

Q. And foremen in charge of the several departments?

A. There might have been.

Q. A boiler foreman, wasn't there?

A. Yes, sir.

Q. And pipe fitting foreman?

A. Yes, sir.

Q. And truck gang foreman?

A. I don't know about those.

Q. It was the privilege and right and practice out there at these round houses everywhere for the engineer who takes out the engine to inspect the engine and the work that is done on the engine, wasn't it?

A. Yes, sir.

Q. And if there was anything wrong, if he discovered anything wrong, to ask to have it corrected?

197 A. Yes.

Q. And there were men to do that work, weren't there?

A. Yes.

Q. Make the corrections?

A. Yes.

Q. Now, did you fill the piston rod oil cups before leaving?

A. Yes, sir.

Q. Where did you fill them. When you were right there before you started?

A. Yes, sir.

Q. And did you fill them afterwards any time during the day?

A. Yes, sir.

Q. Whereabouts were you?

A. At Tonawanda.

Q. Did you call the attention of any member of your crew about the steam escaping that day from your engine, or your difficulty in seeing signals?

A. I don't remember that I did.

Q. From where you sat could you see that the steam was escaping from the piston on the left side?

A. No.

Q. How did you know that it was escaping?

A. By the sound.

Q. The sound only?

A. Yes, sir.

Q. Now, as you came along there, and your view was being obstructed by the steam on the right-hand side, as you claim,

198 by the wind carrying it over there, you could have had Mullen take his position on the northwest or the left-hand side of the caboose, and communicate the signals in that way to the

fireman, and he in turn communicate to you? That could have been done, could it not?

A. That is a pretty long question.

The Court: Do you want it read.

(Question read.)

A. No, sir.

Q. Why?

A. Because there is a curve there, and from the front end of the caboose back to the cab would be about 75 feet, and you could not give a signal around the curve so that the fireman could see it.

Q. You don't mean to say that the curve was so great here that Mullen couldn't have stood on the left-hand corner of the caboose and communicated the signal back here to your fireman, and the fireman in turn call it out to you? You don't mean to say that?

A. Yes, I do.

Q. And do you mean to say that could not have been done?

A. Yes, sir.

Q. That that curve was so great that it couldn't have been done?

A. Yes, sir.

Q. And that is your absolute testimony?

A. Yes, sir.

Q. And signals are frequently communicated to your fireman, and then to you, are they not?

A. Yes, sir.

199 Q. When the signals are on the left-hand side it is the ordinary thing to communicate them to the fireman, and in turn the fireman calls them off to you?

A. Yes.

Q. And the only thing that would have prevented it being done on this occasion between Hertel avenue and the dwarf 6 is the curve in the track?

A. Yes, sir.

Q. And you swear that that curve is so great that the fireman could not see Mullen's signal, could not have seen Mullen's signal?

A. From my experience there, I do.

Q. You say the fireman's name was Sauer?

A. Yes.

Q. And you said he was now working for the New York Central, on your direct testimony, did you not?

A. Well, I would have to ask you to modify your question. I can't answer it yes or no.

Q. Didn't you testify here this forenoon that fireman Sauer was now working for the New York Central?

A. I testified that he told me he was. If you will allow me to explain——

Q. After these many trials you are very skillful in answering, I assume, drawing fine distinctions?

A. There is nothing skillful about it, only I haven't seen him working for the New York Central. He told me he was working for the New York Central.

200 Q. During some other trials you had him up here, did you not, at times when he was not working for the New York Central?

A. I don't remember having him up here when he was not working for the New York Central. It seems to me there was one trial when he was over in Canada or some place, and we couldn't get him.

Q. Wasn't he working for the Lehigh Valley the last trial?

A. So he said.

Q. And you had him up here, did you not? He was up here at your request or the request of your attorney? Can you state that on information and belief?

A. You have got me. I don't remember whether he was up here the last trial or not.

Q. You don't know? Didn't you see him here at the last trial? Didn't you talk with him here at the last trial?

A. I remember that there was a remark made before that he was working for the Lehigh, not in their employ.

Q. Didn't he stand up in court the last time? Was he asked to stand up, and didn't you identify him?

A. I couldn't specify whether it was the last trial, but he has been here other trials and stood up in court.

Q. And you knew one of the times he was here, you heard he was working for the Lehigh Valley railroad?

A. Yes, sir.

201 Q. And you had Mr. Sauer over to Mr. Ward's office, did you not? You took him over there on one occasion, or met him over there?

A. I might have met him there.

Q. And he made a statement to Mr. Ward in writing, didn't he, as to what he knew about this accident?

A. I didn't see him make any statement.

Q. You heard him talking with Mr. Ward?

A. Yes, sir.

Q. And telling him about how the accident happened? I don't ask you what he said. I am merely asking you if you heard him talking with Mr. Ward?

A. It seems to me there was some talk about the accident.

Q. And don't you know that he made a statement to Mr. Ward in writing, a signed statement, about the accident?

A. I wouldn't say that he did.

Q. You wouldn't swear that he didn't would you?

A. I don't remember.

Q. Now, although he was in court here several times during the trial of the cases you never swore him, did you?

A. No, sir.

Q. Or Mr. Ward never put him on the stand?

A. No, sir.

Q. Although he was here at your request? Isn't that so?

A. He might have been here at Mr. Ward's request.

202 Q. Well, in your behalf?

Mr. Ward: He has always been subpœnaed by us. I will stipulate that if you want to have it.

Q. He is over here this time at Mr. Ward's request, or under subpœna?

Mr. Ward: He has always been subpœnaed by me when we could find him. Always will be.

Mr. Spratt: He has always been in court here?

Mr. Ward: Except once when we couldn't find him.

Q. Mr. Ward never swore him for you?

A. No.

Q. Now, where new packing is put in, it frequently leaks, doesn't it, leaks steam?

A. In the beginning of the service, yes, sir.

Q. It has to get worn in so that it is smooth and takes the shape of the piston?

A. Usually.

Q. When you came back from Tonawanda, and after your trouble in seeing these two dwarfs that I have called your attention to, on account of this steam, did you call up anyone at the old round house when you were near there and ask them if they would make the repairs?

A. No, sir.

Q. Did you call up the yardmaster's office where you got this engine and ask—or call up the engine house where you got this engine, and tell them about it, and ask them to make the repairs?

203 A. No, sir.

Q. Did you call up the yardmaster's office and ask for any instructions after detailing the condition of the engine?

A. No, sir.

Q. Now, did you lean out of the cab window at all to see whether you could see the dwarf as you came along there?

A. No, sir.

Q. You kept your head right inside the cab?

A. Yes, sir.

Q. Now, with the steam coming up outside, if you had reached your head out you could have seen, could you not, outside of the steam?

A. Not as well as I could in the cab.

Q. Not as well as you could when you were within the cab?

A. No.

Q. Why was that?

A. Because from the protection of the running board. It pushed the steam that much further out from the boiler, and allowed a space through ahead to see Mullen's signal.

Q. Now, if you had stopped your engine, the steam would have cleared away, and you could have seen the situation then, could you not?

A. If there wasn't too much steam coming from the leak in the belly of the boiler.

Q. You didn't know how much there was?
A. No.
Q. And if you had stopped your engine and got off you could have seen, even though there had been steam, could you not?
204 A. Why, yes, if I had got off and walked ahead, I could have seen if the dwarf was——
Q. And the rule is that when there is any doubt in your mind, to stop, is it not?
A. Yes, sir.
Q. And when you can't see signals where the signals ought to be, it is the rule for you to stop?
A. Yes, there is a rule to that effect.
Q. When you came along there to where this dwarf was you didn't see it?
A. No, sir.
Q. And you didn't stop, did you?
A. No, sir.
Q. Now, the book of rules that was introduced here in evidence, the stop signal is swung across the track? Is that right?
A. Yes, sir.
Q. And you see it how it is illustrated here in the book, how it is swung, (showing book to witness)?
A. Yes.
Q. Now, that is the rule provided by the railroad company, isn't it, in your book of rules, which you had at that time?
A. Yes.
Q. Now, the other rule, the proceed signal, "raise and lower vertically?"
A. Yes, sir.
Q. That is the rule provided in the book?
A. Yes, sir.
Q. Now, the proceed signal, according to the book of rules, is the up and down, about like as I am giving it, is it, according to the book? (Illustrating).
205 A. Yes, sir.
Q. That was not the signal that you claim that Mr. Mullen was giving you, as provided for in the book?
A. That was not the signal he was giving me.
Q. And you were following him although it was not the signal provided for in the books?
A. Yes, sir.

Juror No. 2: What was that?
Mr. Spratt: He said he followed Mullen's signal. He claims he had from Mullen a proceed signal.
Mr. Ward: Supposing you let the witness do the testifying.
Mr. Spratt: Were you asking me or the witness?
Juror No. 2: I would like to get that clear in my mind, how he swore to that.

(Testimony read by stenographer.)

Q. You described the signal that Mullen was giving you as starting from your leg and coming up at some times horizontally?
A. Yes, sir.
Q. Back and forth like that (illustrating)?
A. Yes, sir.
Q. And that is the signal you were following?
A. Yes, sir.
Q. That you claim you were following? Now, is not that signal more like the one that is the stop signal as provided for in the books, in the book of rules?
A. How is that? I didn't catch your question.
206 Q. Wasn't that signal like the one, quite similar to the one provided for a stop signal in the books?
A. Similar to part of the stop signal.
Q. But it is no part of the come-ahead signal as provided for in the books, is it?
A. No.
Q. Now, when Mullen was giving you the signal that you claim that he was giving you, was there times that the lantern passed out from your view?
A. Yes, sir.
Q. So that you didn't get a perfect signal then, if the lantern passed out from your view?
A. Yes.
Q. You couldn't tell what the balance of that signal was, could you, if it passed out from your view?
A. The signal to me was what was in view outside of the caboose.
Q. What is that?
A. The signal to me was what was in view outside of the caboose.
Q. In order to get a proper signal shouldn't your signal have been outside of the caboose, so that you could see the signal from begining to end?
A. Yes, it should have been.
Q. You were not getting that kind of a signal, were you?
A. Yes.
Q. If the light passed out of your view you couldn't see the whole movement, could you?
207 A. I could see all that appeared outside of the caboose.
Q. But that was not a complete view of the whole signal, was it?
A. Yes.
Q. If the lamp passed out of your view you couldn't see all the movement of the lamp, could you, the complete movement?
A. I don't know that it moved after it passed out of my view.
Q. But it did pass out of your view?
A. Yes, sir.
Q. A complete signal ought to be entirely in your view, so that you could see the beginning and end of it, is that right?
A. Yes, sir.
Q. That is true, is it?
A. Yes, sir.

Q. When you can't see a complete signal it is your duty under the rules to stop?

A. When you can't see a complete signal, yes, sir.

Q. It is your duty to stop, isn't it?

A. Yes, sir.

Q. Now, Mr. Kinney, you knew that you were approaching first-class passenger tracks, did you not?

A. I knew I was approaching the east and westbound Falls branch.

Q. And those are tracks over which a great many passenger trains run?

A. Some passenger trains run over there, yes, sir.

208 Q. Sometimes the trains run over there, some passenger trains? You say there is only some in 1908?

A. Yes.

Q. Don't you know that there were passenger — there every half hour?

A. There might have been, and might not have been so often.

Q. Were you familiar with the time-table? Did you know that about that time that there were passenger trains due at that point?

A. Yes, sir; I knew the time-table.

Q. You knew there was a Michigan Central train went along there about that time towards Niagara Falls?

A. Yes, sir.

Q. And you knew that there was a New York Central train coming into Buffalo from Niagara Falls about that time?

A. Yes, sir.

Q. And you knew that you had to be vigilant in approaching those tracks?

A. Yes, sir.

Q. And you knew that this light, the right to run over the track, and enter on the main tracks, might be taken away from you any time before you reached this dwarf signal?

A. It might possibly.

Q. Within what distance could you have stopped your engine?

A. In my judgment, as an engineer, I might have stopped in two or three or four foot.

Q. In two or three or four foot?

209 A. Yes, sir.

Q. So that any time there after you observed the light, or, it was necessary for you to stop, you could have stopped your engine in three or four feet?

A. About that.

Q. Now, if you had stopped your engine within three or four feet after you had passed the dwarf—say, four feet after you passed the dwarf—you and your caboose would have been some distance then away from the switch points?

A. I guess the caboose would have been up to the fouling point.

Q. From where you sat in the cab up to the front end of the engine I think you said was about 35 feet,—or what was that?

A. I think I said it was 45 feet.

Q. I thought your whole engine was that including the tender?
A. No, I think that you are mistaken.
Q. 45 feet? And you think the caboose was how long—30 feet?
A. I think I said 35 feet.
Q. But your engine would not have been at the fouling point, at all, would it?
A. No.
Q. And if you had stopped where you were you would have been in safety within three or four feet of the dwarf 6? If you did get out on the main track, Mr. Kinney, then to go back to the place where you are to get the train you would have gone down on the most westerly or the south east bound track, as it is called, that is, the eastbound track, would you not?

210 A. Yes, sir.

Q. And in that way, if you were running on the main line, you would have been running with the current of traffic?
A. Yes, sir.
Q. You didn't go over on the fence track that night at all, did you?
A. No, sir.
Q. And you don't know anything about the conditions over there that night?
A. No, sir.
Q. Do you know how long you were unconscious? You can form no judgment about that, of course?
A. I don't think I was unconscious over two or three minutes.
Q. And you don't know who came there while you might have been unconscious, whether your train crew came there?
A. I wasn't there long enough for anybody to find me while I was unconscious.
Q. You don't know while you were unconscious what was done there?
A. No, not while I was unconscious.
Q. Did you learn that they telephoned, for the wrecking crew to come there?
A. Yes, sir.
Q. And did you learn they telephoned for a doctor and an ambulance?
A. No, I didn't learn that.
Q. So that you don't know just what your crew were doing all this time?

A. I don't.

211 Q. But you think that the first man that you recognized afterward was a man named Freeman?
A. He was a stranger to me that night of the accident.
Q. You have met him a great many time since, haven't you?
A. Yes.
Q. You know his name is Freeman?
A. I do now, yes, sir.
Q. Now, Mr. Kinney, when you would be at the dwarf, or just about approaching the dwarf, the piston rod, the place where the steam was coming from, was some 25 feet ahead of you?

A. Yes, sir.

Q. So that the steam from the piston rod then under those conditions, and the steam from the hole in the belly of the boiler, which was also about the same distance ahead, would not obscure your view of the dwarf when you were at that point, would they?

A. Not when I was—at the dwarf?

Q. Just when you were opposite the dwarf?

A. No.

Q. At that point could you see the dwarf?

A. No.

Q. Well, how far back from the dwarf would you have to be in order to see it from your engine?

A. With the steam from these——

Q. No, assuming it was clear, how far back from the dwarf point would you have to be before you could finally see the dwarf, the last view of it?

212 A. If there was no steam around?

Q. Yes.

A. I would have to be six or eight feet——

Q. Six or eight feet south of it, southerly of it?

A. Yes. Maybe more than that.

Q. How much more than that?

A. You have got to get back far enough so that you can see through——

Q. I am asking you how far back would you have to be when you could get your view of the dwarf, the last view of it?

A. I will have to give you a guess answer.

Q. Give us your estimate.

A. I put it 12 or 15 feet.

Q. 12 or 15 feet?

A. Yes, sir.

Q. Considering that the steam was coming from the piston rod, and the steam coming from the belly of the boiler, being then about 25 feet ahead of you, under those conditions, when you were at that point there would be nothing to obstruct your view of seeing the dwarf, would there?

A. The steam from the injector pipes, and under the cab.

Q. Didn't you tell me at the previous examination that that didn't have anything to do with obstructing your view? Didn't you tell me before that the only things that obstructed your view, the only steam, was from the pistons and the belly of the engine?

A. I told you the steam from the injector throttles in the

213 cab didn't have anything to do with it.

Q. Just answer my question yes or no.

A. No.

Q. You didn't?

A. No, sir.

Q. How much steam came from under the seat of the cab that you speak of?

A. I couldn't tell you how much, what the volume was, no.

Q. That wasn't the running board, was it?

A. It was under the cab. Yes, in under the running board of the cab.

Q. Didn't you tell the jury before that the steam that prevented you from seeing the dwarf was the steam that came up from the belly and other side of the engine, and under the running board? Didn't you tell me that?

A. Yes.

Q. And that was what prevented you from seeing?

A. But you have changed the position since then.

Q. You told me that, didn't you?

A. Yes.

Q. Now, you say the steam from under your seat prevented you from seeing? Is that right?

A. Yes, sir.

Q. How much steam was there from under the seat that prevented you from seeing?

A. I couldn't give you he exact volume of it.

Q. You couldn't give it?

A. No.

214 Q. Was it so that you couldn't see through it?

A. Yes.

Q. And that you sitting in the cab couldn't see out, and nobody could see you in the cab?

A. They could see me in the cab.

Q. But you couldn't see out?

A. No.

Q. I see. If that was the case how could you see Mullen's signals?

A. As I explained, by looking along the top of the running board and out over the steam chest and alongside the caboose above this steam.

Q. The steam didn't come up at all?

A. Yes, it came up.

Q. But didn't come up high enough, so as to obstruct your view of Mullen?

A. It come up far enough away from the boiler to leave an opening through there.

Q. Did you have any difficulty at all in seeing Mullen's signals?

A. No.

Q. Now, on the third trial you were asked with reference to this engine:

"Q. Was there steam escaping then from the belly of the boiler, as you call it?

A. There was some steam escaping then.

Q. Did you examine particularly as to where it came from?

A. No, sir.

Q. You saw that it was escaping?

A. I saw some.

Q. Then you knew there was a leak there under the belly of the boiler?

A. I couldn't state how extensive."?

A. Yes.

Q. Was this question asked you:

"Q. How extensive was the steam coming out of it at
215 that time, with a hundred pounds' pressure?" and did you answer:

"A. About as much as the smoke out of a cigar." Did you answer it?

A. I might have answered that way.

Mr. Ward: Where is that?

Mr. Spratt: That is page 268, when he started out.

Mr. Ward: Oh, at the round house.

Q. Were you asked:

"Q. So that it was very slight at that time?" and did you answer, "A. Yes, sir."? That is true, isn't it.

A. Yes, sir.

Mr. Spratt: You may examine.

Redirect examination.

By Mr. Ward:

Q. Mr. Kinney, I want to show you these pictures. (Showing pictures to witness.) I show you first a picture looking along the line of the Y, taken 170 feet each of the dwarf between the tracks. Does that affair represent the situation as it was at that time?

A. Yes, sir.

Mr. Spratt: I object to it, as improper, incompetent and immaterial.

The Court: Objection overruled. He says it represents the situation as it was at that time, doesn't he?

Mr. Ward: Yes.

The Court: That is competent.

Mr. Ward: I offer it in evidence.

The Court: Received, and will be marked in evidence.

216 (Picture received in evidence, and marked "Exhibit No. 3.")

Mr. Ward: I offer a second picture taken from a point about opposite the dwarf, looking toward Tower 55.

Q. Does that fairly represent the situation as it was at that time?

A. Yes, sir.

Mr. Ward: I offer that picture in evidence.

Mr. Spratt: Same objection.

The Court: Same ruling.

Mr. Spratt: Exception.

(Picture received in evidence eand marked "Exhibit No. 4.")

Q. This (indicating) is a little closer, itsn't it? The dwarf is not shown? It is taken from a point opposite the dwarf?

A. Yes, sir.

Mr. Ward: I offer another picture looking toward Niagara Falls on the main line tracks between rails, picture taken opposite the two-arm signal.

The Court: The same ruling, I will receive that and have it marked in evidence.

(Picture received in evidence and marked "Exhibit 5.")

Q. Does that fairly represent the situation as it was there at that time looking toward Niagara Falls?

A. Yes, sir.

Mr. Spratt: When were those pictures taken?

217 Mr. Ward: They were taken according to the date that is on them, 10-25-08.

Mr. Spratt: Are these the same ones that were introduced in evidence before?

Mr. Ward: Yes.

Mr. Spratt: They are marked, are they?

Mr. Ward: Two or three times. These are the original photographs. We have had the copies, but these are the original photographs. I also offer a fourth picture looking toward Niagara Falls taken from a point 15 feet east of the high-arm signal, showing main tracks.

(Photograph received in evidence and marked "Exhibit No. 6.")

Q. These all correctly represent the situation as it was there at that time, Mr. Kinney?

A. Yes, sir.

(Photographs shown to the jury by Mr. Ward.)

Q. Now, Mr. Kinney, I wanted to ask you a few more questions. On Mr. Spratt's cross examination there were a couple of things that you expressed a wish to explain as being unable to answer directly the questions asked. Do some steam leaks grow worse with higher pressure and some grow less?

A. Yes.

Q. Just explain that to the jury. I couldn't quite understand you, and I think we would like to have that made a little clearer.

218 A. A steam leak at the round house you can't tell how it is going to turn out. Some leaks will get worse and some will get better. Now, you take flues, for instance, as you put more pressure on, get a hotter heat, the less it will leak; and then you take what we call—for instance, the piston rod packing, if that is not fitted properly, if the rod is not smooth, you can't tell when you start out whether it is going to get better or get worse until it has seen some service.

Q. Are there also some steam leaks that increased pressure tends to close?

A. Yes, sir.

Q. And at the time you left the round house with that engine

was its condition such as would justify you under the rules and practices of the company in refusing to operate it or turn it in?

Mr. Spratt: I object to that, as incompetent, and improper, and calling for the conclusion of the witness. The rules are the best evidence for the jury to say.

Mr. Ward: There is no rule as to just what the condition is. There is no written rule that describes what condition justifies a man.

The Court: He may answer, and I will give an exception to the defendant.

Mr. Spratt: Exception.

A. No, sir, it was not.

Mr. Spratt: I move that that be stricken out.

The Court: Motion denied.

Mr. Spratt: Exception.

219 Q. When you left the round house with it was its condition such that it emitted steam so as to obscure the view of the engineer of signals?

A. No.

Mr. Spratt: I object to that, on the same ground.

The Court: Same ruling.

Mr. Spratt: Exception.

Q. During the day did the escape of steam from the left piston increase?

A. Not until I had started out with this coal train for Black Rock.

Q. And then what happened?

A. It was going up grade—up Genesee street grade—put more power on it, it increased in volume, the leak.

Q. Mr. Spratt has asked you about difficulty in seeing other dwarfs that day. Were you prevented from seeing any other dwarfs that day until you reached this one?

A. No, sir.

Q. What difficulty did you have?

A. Nothing more than looking through steam in the day time.

Q. Those signals were approached in the daytime, and not in the night time?

A. Yes, sir.

Q. Now, you answered a question which Mr. Spratt asked you, Mr. Kinney. I don't know whether you understood it or not. Mr. Spratt asked you the question whether in approaching a signal that was at danger, and you were receiving come-ahead signals
220 from your head-end brakeman, whether you would heed the signal, or respond to the hand signal, and your answer was that you would obey the hand signal. Now, is that so in all cases?

Mr. Spratt: That I object to. He has given his testimony on that.

The Court: Same ruling. He may explain.
Mr. Spratt: Exception.

A. Yes, sir.
Q. For instance, take this situation here. Let me ask you: Supposing after having observed that signal green as you testify you did before you reached Hertel avenue, supposing you had observed it changed, then what would you have done, irrespective of hand signals?

Mr. Spratt: I object to that. He has already answered that question.

A. I would have stopped.

The Court: Of course the answer is in. Do you wish to have it stricken out? I will deny the motion and give you an exception.
Mr. Spratt: Exception.

Q. Explain now. Your answer to Mr. Spratt was that you would obey the hand signal. Your answer to me was that if you had seen it change you would have stopped. Just explain what you mean by that, so that we will see.

Mr. Spratt: I object. The witness has already gone over that. It is suggestive.
221 The Court: We want it explained so that we will all understand it. The objection is overruled. He may answer.
Mr. Spratt: It seems to me, your Honor, there is no doubt about what he testified to.
The Court: Well, he can tell again, if necessary, so that we will clearly understand him, what he means.
Mr. Spratt: I think it merely adds confusion to it.
The Court: No, I don't think so.

Q. The judge says you can explain.
A. If Mullen had been giving me a come-ahead signal, and I had seen it change, I would have stopped.
Q. Why?
A. Because it would have indicated that there was something wrong, that I was wanted to stop.
Q. If in coming up to that dwarf, this particular dwarf I am talking about, in coming up to this particular dwarf instead of observing it green you had observed it purple, would you have proceeded?
A. No.

Mr. Spratt: Same objection.
The Court: Same ruling.
Mr. Spratt: Exception.

Q. Did you mean to testify in answer to Mr. Spratt's question that you would have proceeded?

Mr. Spratt: I object to that.

A. No, I would not.

Mr. Spratt: I object to that

222 The Court: Same ruling.

Mr. Spratt: I object to that, as leading and suggestive. There is no doubt about what he testified.

Mr. Ward: I agree with you. Mr. Kinney did testify clearly in answer to your question that if he had perceived that dwarf purple, whether he would have gone on, and he said he would have. He didn't mean it. I know he didn't mean it, and you know he didn't mean it.

The Court: I am permitting him to explain now. If he made any mistake, he can do it.

Q. Did you understand that Mr. Spratt asked you what you would have done if you saw that dwarf purple? Did you understand it that way?

Mr. Spratt: I object to it.

A. No, I didn't understand it that way.

Q. What did you understand?

Mr. Spratt: I object to it, after all this lecturing and indicating what he wants to swear to.

The Court: I am going to let him do it, so that you can have the exception.

Q. What did you understand Mr. Spratt to ask you?

Mr. Spratt: I ask that my question be read to him.

Mr. Ward: Your Honor has permitted Mr. Kinney to explain.

The Court: For the purpose of bringing out what he meant. We want to know what he meant by his testimony.

223 Q. Did you understand that you had been asked such a question and answered it in the way I have indicated, Mr. Kenney?

Mr. Spratt: Same objection.

The Court: Same ruling.

Mr. Spratt: Exception.

A. I understood Mr. Spratt to ask me if I thought I had a perfect right to go out there without noticing dwarf 6, after seeing it clear, green, at Hertel avenue, if I had a perfect right to go out there on the main track on Mullen's signal, without observing dwarf 6 after that time.

Q. Is that how you understood his question?

A. Yes, sir.

Mr. Spratt: I ask that that be stricken out as putting words in my mouth that I never uttered, nothing of that kind.

The Court: He is telling what he understood you to say. This is all a matter for the jury. If they think he is not telling the truth about it they can use that in determining the weight to be given to

his evidence. He is asked now to explain what he meant, and how he understood the question to be, and I am permitting him to do it.

Mr. Spratt: I object to what he says that I asked him, when the record is here, what I did ask him.

Mr. Ward: Certainly, you asked him that, and he didn't understand you. That is perfectly plain.

Mr. Spratt: You are telling him now he didn't understand me.

Mr. Ward: Mr. Spratt, you know something that you
224 squeezed out of him inadvertently is contrary to his testimony in this case and every other testimony he has ever testified to.

Mr. Spratt: Not at all. He testified there just in accordance with the way he acted that night, just exactly.

The Court: Very well, we will take the answer, and the jury will know what weight to give to his testimony.

By Mr. Ward:

Q. Mr. Spratt has asked you about a rule to stop when signals cannot be seen. Does that rule and practice apply to a movement where you are receiving signals from a head-end brakeman?

Mr. Spratt: I object to it. The rules are in evidence, and govern.

The Court: The same ruling.

Mr. Spratt: Exception.

A. No, sir.

Q. Are there times when an engine is pushing cars when the cars extend a quarter or a half a mile ahead of the engine?

A. Yes, sir.

Mr. Spratt: I object to it. It is not involved in this case. It is just an engine and a caboose.

Mr. Ward: You are claiming this rule has general application, and I am showing that there are exceptions to it.

The Court: Of course we don't want to go into other questions.

225 Q. Are there times when you are pushing one car or several cars on the main track, when you come to high-arm signals, what do they do, when the first wheels strike them?

A. They go at danger.

Q. Does the engineer have to pass them while they are in that position?

Mr. Spratt: I object to it, as incompetent, and improper, and not involved in this case.

The Court: Same ruling.

Mr. Spratt: Exception.

Q. What governs his movements?

Mr. Spratt: I object to it, as incompetent and improper and not involved in this case at all.

The Court: Same ruling.

Mr. Spratt: Exception.

Q. What governs his movements?
A. The signals by the man on the leading car.
Q. Was the signal which Mr. Mullen gave you, as you saw it from your engine, a complete signal or a partial signal?
A. A complete signal.
Q. Is it the practice for a man to hold his lantern continuously in your view when he is giving his signals from time to time?

Mr. Spratt: I object to it, unless confined to this time in question.
The Court: He may answer.
Mr. Spratt: Exception.

(Question read.)

226 A. No.
Q. Does the disappearance of the lantern after a signal is given modify the signal or indicate that it is not a complete signal?
A. No, sir.
Q. Did that lantern which Mr. Mullen was using to signal you, serve any other purpose in the train movement?
A. No, sir.
Q. How does he see ahead of him?

Mr. Spratt: That I object to, as leading and suggestive.
The Court: He may answer.
Mr. Spratt: Exception.
The Court: If he knows he may tell.

A. By the rays of his light.
Q. Then it does serve some other purpose than giving you signals, doesn't it?
A. I answered it too hastily.
Q. Are you getting tired, John?
A. I guess I can finish up.
Q. In the railroad business is it just as important to keep your trains in motion when the signals justify it and require it as it is to stop when they require it?

Mr. Spratt: I object——
The Court: That is an academic question.
Mr. Spratt: Precisely; not in this case.
The Court: But we will take it as interesting in the history of railroading.

Q. The judge says you may answer.
A. Yes, sir.
227 Q. When a man is engaged in making a turning movement such as you were engaged in, which involves the use of passenger tracks, is it contrary to the use and practice for you to hold up those tracks?

Mr. Spratt: I object to that, as incompetent, and improper. He gets the signal, and he has the right to take all precautions.
The Court: I will take the answer, as I have the others.
Mr. Spratt: Exception.

A. Yes, sir.

Q. When you get a signal which under the rules and practices of the company justifies you to proceed, what is it your duty to do?

A. Proceed as according to rules.

Mr. Spratt: I object to it. The rules are the best evidence.

The Court: Proceed, according to the rules, he says. That is another proposition that we can most all agree to.

Q. Is there any such thing as time table superiority in a movement of that sort?

Mr. Spratt: I object to it, as incompetent, irrelevant and immaterial.

The Court: He may answer.

Mr. Spratt: Exception.

A. No, sir.

Juror 2: That is something I don't know what that means.

The Court: Ask him to explain it.

Q. Explain to us what time table superiority means.

228 A. At that particular point those tracks are governed by interlocking signals, and if I get the signal I have got as much right to go out there as a first class passenger train; that this territory here was put by itself in the time table, in the special instructions in the time table. If a freight engine, switch engine, gets the signals to come out on the main track they have just as much right there as a first class passenger train. It is so specified in the time table.

Mr. Ward: That is all.

Recross-examination.

By Mr. Spratt:

Q. Now, you say that some leaks will become stopped, get better as you go on, and you referred to flues?

A. Yes, some will. It depends on the age of them.

Q. They heat and expand, I suppose?

A. Yes.

Q. But the flues have nothing to do with the leaks that you complain of here of the steam obstructing your view?

A. No.

Q. Now, the piston rod, you can't tell whether they will grow better or grow worse?

A. Not until you give it a reasonable amount of service.

Q. And you had a reasonable amount of service in running down to Tonawanda and back to learn how they were acting, didn't you?

A. Not for that class of engine.

Q. Well, when you drew your train over to Black Rock

229 you knew then the conditions, did you not?

A. I knew the conditions of the engine, yes.

Q. And you didn't put the engine on a side track? You just went on, using her after that did you not? You went on using her after you learned in drawing over this train of coal cars that she was leaking badly?

A. Yes, she was leaking.

Q. So that you knew the situation?

A. Yes, sir.

Q. And you didn't put her on the side track over there or turn her in after you had left those coal cars?

A. No, sir.

Q. You say you were not prevented during the day time, absolutely from seeing the dwarfs on account of the steam? It was daylight, and you could see through the steam?

A. Yes, sir.

Q. Now, you knew that with the increased darkness and the steam, it would be more difficult to see, did you not?

A. Yes.

Q. And so, notwithstanding that you knew it was going to be dark when you were using this engine you went on using her fully aware that the darkness and the steam would interfere with your seeing the signals, did you not?

A. No, I did not know positively that it would.

Q. You knew that the steam interfered with you in seeing a couple of dwarfs even during daylight, didn't you?

230 A. To a certain extent they did.

Q. And didn't you know with the darkness and the steam increasing, as you claim that it was after this first experience in starting out, didn't you know that you would have more difficulty in seeing dwarfs under the condition of darkness and increased amount of steam?

A. No, I did not.

Q. You did not?

A. No.

Q. In answer to Counsel's question you told about going out on the track, and after your engine passed, the towers which were connected up electrically with the track would change the signals, did you not?

A. Yes.

Q. Well, this dwarf—the dwarfs are not connected up electrically with the towers are they?

A. No, sir, not dwarf 6.

Q. Those dwarf signals are not? Do you know of any dwarfs that are connected up?

A. I can't recall them to memory, but it seems to me there are some.

Q. But dwarf 6 was not connected up electrically with the tower, was it?

A. I don't think it was.

Q. You have said something here about the reason why this up and down signal might not be made was that the lantern might go out—the light might go out? Did you say that?

A. Yes, sir.

Q. Now, you know that the railroad company have had great experience in that line before they adopted these rules?

231 A. I don't know how much experience they had.

Q. Well, they had the combined experience of a good many engineers, did they not, and trainmen?

A. They might have had.

Q. And I call your attention, as to the liability of lights to go out, to a figure on page 58, showing the back swing, backing up (Showing book to witness). Look at that. That is the way—that is a back up signal, isn't it?

A. Yes.

Q. And the lights don't go out when they are doing that, do they, as a rule?

A. I have seen them go out.

Q. But as a rule they don't?

A. I don't know of any rule that prevents them from going out.

Q. As a custom they don't go out? As a rule they keep lit, don't they?

A. Sometimes they do and sometimes they don't.

Q. I suppose more than half the time they go out?

A. No, I wouldn't say that.

Q. How much of the time do you think they go out?

A. I am not a competent judge.

Mr. Spratt: I introduce that part of that sketch in evidence.

The Court: If there is no objection, received.

Mr. Ward: No.

232 The Court: Received, and will be marked in evidence.

(Sketch received in evidence, and marked "Exhibit A.").

Q. If the rule is to swing a lantern around like that to back up (illustrating), don't you think that would be more apt to put a light out than to move it up and down as provided by the rule?

A. It depends on how much speed they give it.

Q. Well, ordinary speed, ordinary movement?

A. I don't know.

Q. Were you ever uncertain as to the signals that Mullen was giving you? You have described them each one. Were you ever uncertain what these signals were that he was giving you, what they meant?

A. No, sir.

Q. Did the steam ever obscure the signals given by Mullen to such an extent that you were uncertain as to what they were?

A. I don't remember as it did, no.

Q. What?

A. I don't remember that it did.

Q. Did it interfere at all with your seeing Mullen's signals?

A. It might have blown up in a small volume.

Q. I say, did they?

Mr. Spratt: I ask that be stricken out, and to have an answer yes or no.

The Court: Very well. Read the question, and strike out this last answer.

(Question read.)

Q. Answer that yes or no.

233 A. If I remember right, your Honor, I don't think I can answer that question.

Q. You can't answer it?

A. Yes, or no.

Mr. Spratt: I think I am entitled to an answer on that.

The Court: He asks you now definitely whether or not this steam obscured your seeing those signals, and you can say yes or no.

A. No, not wholly.

Q. Did they to some extent?

A. To some extent, yes.

Q. I think you testified this morning that you stopped not because you got a signal to stop, but because Mullen was signalling you to come ahead fast—faster?

A. That is as I understood his signal.

Q. And that is the reason you stopped?

A. Yes, sir.

Q. Haven't you testified on previous trials that the final signal that you got from Mullen was the stop signal?

A. I might have, under rule 106.

Mr. Spratt: I ask that that be stricken out, 106.

The Court: He asks you about what testimony you have given on previous trials.

A. I don't think I did.

Q. You are sure you didn't aren't you?

A. Yes.

Q. Mr. Kinney, was there a rule known as 27 in force at

234 the time of this accident (showing book to witness)?

A. Yes, sir.

Mr. Spratt: I offer that rule in evidence.

The Court: Read it in evidence.

Mr. Spratt (reading): "27: A signal imperfectly displayed, a white light by night or any fixed signal, or the absence of a signal at a place where a signal is usually shown must be regarded as a stop signal, and the fact reported to the superintendent."

I offer rule 106. (Reading:) "In all cases of doubt or uncertainty the safe course must be taken and no risks run."

I offer in evidence rule 502.

The Court: Yes.

Mr. Spratt (reading): "The engineman or motorman is jointly and equally responsible with the conductor for the safety of the train and movement of the same in strict compliance with rules, and they must decline to obey any orders which involve peril to the train

or violation of the rules. When there is no conductor, or he is disabled, the engineman or motorman will have charge of the train and will be governed by the rules prescribed for conductors."

By Mr. Spratt:

Q. Those were in force at the time of this accident, were they not, Mr. Kinney?
A. Yes, sir.

Mr. Spratt: That is all for the present.
235 If your Honor please, I would like to reserve the right to cross-examine Mr. Kinney on some things further I haven't had a chance to look up.
The Court: Later on he will be called back for further cross examination, if you desire.

By Mr. Ward:

Q. Mr. Kinney, you told Mr. Spratt that the signal you were receiving from Mr. Mullen was not the vertical up and down signal given in the book. Was it the signal commonly used in practice?
A. Yes.

Mr. Spratt: I object to that. He has already gone over that.

Q. Was the vertical up and down signal shown in the book the signal that the men commonly used in practice in giving proceed signals?

Mr. Spratt: That I object to, as incompetent and immaterial.

A. No, sir.

The Court: I will take it.
Mr. Spratt: He has gone all over it, and the defendant is not bound by any rules these men may try to enforce among themselves.
The Court: It is understood, Gentlemen of the jury, that the rules are to prevail, that they are to obey rules.
Mr. Ward: I suppose if a practice is universally adopted among the railroad men——
236 The Court: They may also take into consideration the practice, if they believe it is a universal practice, and it is practiced here, they may take that into consideration also.
Mr. Spratt: That I except to, the latter part.
The Court: Certainly.

Q. Was this steam that was escaping from your engine as you moved around that curve, was it driving ahead of you, or was it falling back as you advanced?

Mr. Spratt: I object to that, as leading and suggestive. He has already described it both on direct and cross.
The Court: He may answer. Exception to the defendant.

A. It was driving along with me towards Tower 55.

Mr. Ward: That is all.

EDWARD H. PECK, *was* duly sworn as a witness in behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. Ward:

Q. Mr. Peck, you are a New York Central engineer, aren't you?
A. Yes.
Q. You have been an engineer for the New York Central for how many years?
237 A. Eighteen years.
Q. And you were an engineer there when Kinney was an engineer, weren't you?
A. Yes.
Q. And you got to be an engineer about the same time he was?
A. Oh, about two years after he.
Q. Two years after?
A. About that.
Q. Up to the time when Mr. Kinney got hurt, and before that and since, what is the rule of promotion in railroad service?
A. The oldest man shall have the preference in jobs and runs.
Q. What effect does that have on their pay?
A. Well, at that time it had considerable effect, that the oldest men had the best paying runs.

Mr. Spratt: I object to that. The rules are the best evidence.
The Court: Is there a rule on that subject?
Mr. Ward: I don't know whether there is or not.
Mr. Spratt: They have asked us to produce an agreement.
Mr. Ward: If you have got anything of that sort I would be glad to have it, Mr. Spratt:

(Mr. Spratt hands paper to Mr. Ward.)

Mr. Ward: Is this what was effective then or now?
Mr. Spratt: Then.

238 Q. Are you familiar with this circular, New York Central & Hudson River Railroad Company, rates of pay for engine men, effective December 1st, 1906. Are you familiar with that (showing to witness)?
A. I don't believe I have ever seen one of those in that form. We have a little book, smaller than that considerable.
Q. This book contains this rule: "The oldest engine man in line of service shall be given preference in work or runs, other things being equal. This means that seniority shall prevail in all classes of service, as passenger service, freight service, and yard service. This is not to apply in passenger service where there are no regularly

assigned extra passenger engineers doing passenger work only." Is that substantially the rule that was in force as you understood it at that time?

A. About the same.

Q. What effect does that have on the pay, Mr. Peck?

A. Well, that would allow the oldest man to——

Mr. Spratt: The rules cover that also, I think.

Q. The pay is per mile and per day?

A. Per mile and per day.

Q. What effect does seniority in service have on the pay?

Mr. Spratt: I think the agreement, Mr. Ward, covers everything, and that is the agreement between the engineers and the railroad.

Mr. Ward: No, it does not cover that.

239 The Court: Can you point out——

Mr. Ward: If Mr. Spratt can point it out, I would be glad to have him.

Mr. Spratt: It is what they shall allow over time and per mileage.

Mr. Ward: It says what the pay shall be, and it says that seniority shall prevail. What seniority means does not appear there at all.

Mr. Spratt: It does. The oldest engineer in line of service shall be given the preference, other things being equal.

Mr. Ward: I want to know what effect that has on the pay. Here is a man about Mr. Kinney's experience, and he has been there ever since. Unless you can indicate it to me in the printed form, I can't get it any other way that I know of. I read in evidence the rates of pay, November, 1906, passenger service, all classes of engines, $3.85 per day or 03.85 cents per mile.

Q. What is it now?

A. $4.73 a hundred or 4.73 cents per mile.

Mr. Spratt: Then or now?

A. At the present time.

Mr. Spratt: I object to that as incompetent and improper. It is what they were getting then. I object to what they are getting now as incompetent and improper.

The Court: For what reason do you offer that?

Mr. Ward: In the first place, the rule is that a man who

240 is engaged in a regular business and has a regular system of promotion where he can establish in a fairly reasonable way what his future will be, provided he proceeded along the same line as the other men have, his damages depend upon the future, and he is entitled to prove what the future has for him. This has been up in several railroad cases in the state of New York, in the case of Gray vs. Metropolitan Street Railway Company, 13 Appellate Division, and the court held that it was proper to show the probability of advancement to higher positions. The general principle being that where it is part of the contract of employment you are entitled to show what the contract of employment means to the man for the

present and for the future. There being no money investment, no capital involved, it is purely a matter of wages.

The Court: What he would gain by continuing in service, not being prevented to serve, up to his accident, or perhaps he might be discharged.

Mr. Ward: Oh, of course.

The Court: All those things should be taken into consideration. You are undertaking to show what, if he had remained in the service, he would probably be getting at this time?

Mr. Ward: Your Honor has expressed that much more briefly and clearly than I have.

241 The Court: I think he is entitled to show it.

Mr. Spratt: I think not. He is just entitled to show what he was earning at that time. He might have been discharged if he hadn't received a very serious injury, just for this accident.

The Court: Of course, they may take that into consideration that he might have been discharged for some other cause.

Mr. Spratt: Here you are taking a time when conditions are inflated. That is the purpose of its being offered.

The Court: If he had stayed in the service he would be getting higher pay now?

Mr. Spratt: That is all problematical. He might have got discharged.

The Court: We allow those things in proving damages.

Mr. Spratt: I think not at this time. I take an exception.

The Court: You may have an exception. We do allow that on the question of future value of services, just as we take into consideration the Carlisle Tables of Mortality.

Mr. Ward:

Q. Now, Mr. Peck, the agreement here says, all classes of passenger engines, $3.85 per day or 03.85 cents per mile. What do you say it is now?

Mr. Spratt: That I object to. Kinney was not running a passenger engine.

Mr. Ward: Not on this day, but he had been in passenger

242 service, and his natural order of service was to passenger service as he has testified.

The Court: I will take it.

Mr. Spratt: Exception.

A. The pay at present?

Q. Yes.

A. Is $4.73 a hundred miles.

Q. That would be per mile 04.73?

A. That would be 04.73 cents per mile.

Q. What does a freight conductor get per day?

A. There is two rates on freight. In fact, three for the size of the engine.

Q. I will read the old rates first. Freight 4.50 for class G, 4.40

for classes I and K, 3.75 for switch engines, ten hour basis. What do they get now?

A. Now for a freight engine that we used to get the old rate for, we get $5.60 a hundred, and one-eighth of that would be seventy cents an hour.

Q. And switch engines?

A. And switch engines pay two rates. $5.40 for the largest class for eight hours, and then there is another lower rate than that. That I don't know what it is. I don't run switch engines very often.

Q. In the old days they worked ten hours on switch engines?

A. At that time—doesn't it give that switch engine pay in there?

Q. Switch engine is ten hour basis, $3.75. Now they work eight hours?

A. Now they work eight hours, and they get the same pay they used to get for ten, both in road and yard service.

243 Q. As a man grows older in service, is he promoted from freight engineer to what? What comes next?

A. To passenger service.

Q. You are junior to Mr. Kinney by two years?

A. By two years.

Q. What kind of work are you doing?

A. Well, some of the time I am on passenger and some of the time on freight.

Q. You have run the superintendent's car, haven't you, the superintendent's engine?

Mr. Spratt: I object to it as incompetent and immaterial.

Mr. Ward: This is for the purpose of showing his qualifications as an expert. I expect to ask him about rules and regulations and practices.

The Court: It is part of the man's history anyaway. It is perfectly proper.

Mr. Spratt: Exception.

A. I do a good deal of the time.

Q. That is an engine and a car connected with one that you carry the superintendent in around over the divisions?

A. With the observation part on the front end of the car.

Q. Then you are the man that runs the engine that draws the pay car, too, aren't you?

A. Yes, sir.

Q. That is your present job?

A. Yes, sir, it is.

Q. In addition to those special jobs you have had constant
244 experience in running both freight and passenger trains?

A. Both freight and passenger on all of the runs west of Syracuse.

Q. You were familiar with this Black Rock yard too, aren't you, Mr. Peck?

A. I was then and I am now.

Q. Prior to Mr. Kinney's injury, did you make any further movements through those yards?

was working right around Buffalo in the vicinity a good the time.
Vere you acquainted with that Y there?
was.
nd you know the location of the switches and the signals, e general way in which they were operated at that time?
do.
Tou were familiar with the rules and the practices of the com- they were in force at that time, were you, Mr. Peck?
es, sir.
here has been some discussion here in Mr. Kinney's testi- bout the way a proceed signal is given, and I call your atten- the proceed signal found in the book of rules at page 87, we have offered in evidence, and which—can you take that ent there (indicating) and illustrate how that proceed signal as shown in the book of rules?
hat would be up and down like that (indicating).
s that the way that signal is given in practice?

Mr. Spratt: I object to it as incompetent and immaterial.
The Court: Objection overruled. He may tell.
Spratt: Exception.

s that the way that signal is given in practice? With a ?
never saw it given that way only once in a while. You will ew man give a signal that way. It is an awkward signal to

low does the ordinary railroad man give a proceed signal with rn?
Indicating.) (Witness indicates.)
Tou are indicating swinging your arm out from your hip to ontal position out——

Spratt: Up to his head he gives it.
Witness: It would depend on how fast.
Spratt: From his leg up to his head.

Tou are indicating the swinging of a lantern from your hip m your body up even with your head and down again? Is rrect?
ike that (indicating).
s there any modification of that signal for the various times eed movements?
Why, if you were giving a come-ahead signal to come slow, ould make a little shorter movement with the lamp. The on the lamp should be rigid—the switch man—and the ny now make them that way so that you can make the lamp nd you can hold the lamp in your hand, and give a signal to come fast or just as you want.
Q. How was it at that time?
A. The handles at that time were not rigid unless the

men made them so themselves. They wired the handles rigid—some of the men.

Q. If the men gave a proceed signal, the way the book says, by raising the lantern up and down vertically, what is liable to happen to the lantern?

A. Unless he made the signal very slow and gentle, he would be liable to put the light out. That's the way to put a light out.

Q. Were you raised in the country?

A. No, I wasn't. I have been railroading ever since I was 15 years old. I was born in the city. I have always worked on the railroad.

Q. What is a stop signal in practice at that time, and my questions all relate to the time of this accident?

A. A stop signal is given the way the book gives it, by swinging your light across the track, or in that case there, the stop signal could be given like that (indicating), so that the whole of it could have been seen.

Mr. Spratt: Indicate just how. Let us see how you indicate the stop signal.

A. That lamp could be swung like that (indicating), just a little short signal.

Mr. Spratt: That is, you raise your hand from your hip——

A. It would not be necessary to do that. You could make it down here (indicating).

Mr. Spratt: You raise your hand—that signal you gave——

Mr. Ward: Please let me finish.

247 The Court: He wants a fuller explanation of the way they give a stop signal, and I have permitted him to answer.

Mr. Ward: I would like to put on the record the answer of the witness.

Mr. Spratt: I want it done now.

Mr. Ward: That is what I am going to do if you will only keep still and let me do it.

Q. Give the stop signal that you said could be given.

A. It would not make any difference how high you raised your hand. It would still be a stop signal if you gave it down here (indicating), or you could give it that way (indicating) or you could give it over your head if you wanted to.

Q. You are indicating a movement—which is horizontal? Is this way horizontal (indicating)?

A. This way is horizontal (indicating).

Q. You are indicating a movement in a horizontal direction at any height?

A. At any height. It would not make any difference.

Q. But a movement up and down is what?

A. That would be a come-ahead signal.

Q. Now, you are familiar with this rule, Mr. Peck, 102: "When cars are pushed by an engine or a motor, except when shifting, or making up trains in yards, a flagman must take a conspicuous posi-

tion on the front of the leading car." You are familiar with that rule?

A. Yes.

Q. Was that rule in effect at the time in 1908?

A. It was.

248 Q. What was the practice and custom if an engineer was pushing a train—the practice and custom under that rule if an engineer was pushing a train and he had a brakeman on the front end of the leading car, and if for any reason he was himself unable to observe the position of the fixed signals, what was the practice and custom of operating his train?

Mr. Spratt: I object that that. The rule is the best evidence.

The Court: Objection overruled. He may answer.

Mr. Spratt: Exception.

A. The rule was to take the signal of the man who was stationed on the car. That is what he was there for.

Mr. Spratt: I object. It is not a rule. If there is a rule, the rule is the best evidence. I ask that his answer be stricken out.

The Court: He was asked the custom.

Mr. Ward: The rule was offered in evidence, and Mr. Peck testified he was familiar with it, and then he gave evidence as to the practice under it.

Q. Does it frequently occur in railroad operations when the engineer is pushing a car that he himself is unable to see the fixed signals?

Mr. Spratt: That I object to as incompetent under the circumstances in this case.

The Court: Objection overruled.

Mr. Spratt: Exception.

A. Lots of times it is impossible to see the signal.

249 Q. The engineer's position is on the right side of his cab, isn't it, Mr. Peck?

A. It is.

Q. I will call this thing (indicating the blackboard) a lantern. Now, Mr. Peck, from your position where you are, what kind of a signal do you see me give (indicating)?

Mr. Spratt: I object to it as incompetent and improper, and not put on the record.

The Court: It has got to be described, of course, to go on the record.

Mr. Ward: I will describe it as soon as the witness answers the question.

The Court: I will take it.

Mr. Spratt: Exception. And not the kind of signal given at the time as testified to by Kinney.

The Court: Objection overruled. You may answer.

Q. (Counsel gives signal.)

A. I know you are making a stop signal now, but the signal I see is a come-ahead signal.

Q. What did you see? That is, outside of this end (indicating) what did you see?

A. I saw a part of a circle.

Q. You saw this book I hold in my hand moving up and down and disappearing in front of the blackboard, didn't you?

A. I did, yes.

Q. And the part of that signal that you saw, did that appear to be a complete proceed signal?

A. That was a proceed signal that I saw.

250 Q. By looking under this blackboard, you could see that I was continually swinging it across my body.

Mr. Spratt: I object to that as leading and suggestive, entirely so.

The Court: He may answer.

Mr. Spratt: If the court please, this witness said he knew what he was giving.

Mr. Ward: Certainly he knew it, because he could see it under the blackboard. That is what I am bringing out.

Mr. Spratt: You are telling him. That is the evil of it. Let him ask him how he knows.

Mr. Ward: I will.

Mr. Spratt: You have told him now.

Q. How did you know that I was giving a stop signal?

Mr. Spratt: You told him.

Mr. Ward: I told him? He is a New Central engineer here under subpœna and he is an honest man and he is telling the truth.

Mr. Spratt: You have sworn some witnesses who have not told the truth.

Mr. Ward: Wait until you swear your witnesses, and you will see some that will not tell the truth.

The Court: Proceed.

Q. How did you know I was giving a stop signal?

A. The part that I saw of your signal was a come ahead signal, but the light disappeared so long, that I surmised that it was a stop signal, although I could see part of it under the board.

251 Q. If I was standing with my back up against this board (indicating), and swinging my arm at right angles across the track with my back against the door, would there anything appear to you except the proceed signal?

A. That would be all that I could see.

Q. In giving a signal on a railroad, does the man giving the signal attempt to keep his lantern all the time in the sight of the man who is receiving the signal?

A. Well—ask that question again.

(Question read).

Mr. Spratt: I don't know how he can testify wholesale on that point.

A. That is a hard one to answer. He should keep his light in view, and if it disappears for any length of time at all, or if the light

disappears, he might have fallen off or something might have happened to him. It would be up to you to stop then.

Q. This is what I mean. In a movement when you want your engine to go ahead, do you keep on giving a proceed signal all the time, or do you give a proceed signal once in a while?

A. Well, different men have different ways of giving signals. Now, if a man giving the signal would be apt to be nervous or a little bit anxious, he might keep his light going all the time, but an old-timer who knows his business and was on the job, why, he would give you one signal, and he would expect the man that was on the engine taking that signal, to watch it, and he wouldn't expect
252 to give more than one if he was an experienced man—well, some experienced men gives more than one, but a man who gives good signals, he gives one signal, and he expects his engineer to watch it, and if he doesn't see it, he expects to get a call.

Q. You take a man riding on the front end of his caboose, what other use has he got for his lantern beside giving the signals?

A. So other people could see him—they could see the light and know there was something approaching.

Q. Is he also charged with the duty of keeping a lookout that they don't run over anybody?

A. That is one of the principal things that he is stationed there for.

Q. Supposing in approaching Hertel Avenue, on the kind of a movement that Mr. Kinney was making against the current of traffic on the Y. tracks, suppose on approaching Hertel Avenue, he had approached the dwarf set at green, what would that indicate to an engineer?

A. That would indicate that the route was set for him to proceed.

Q. Did that give him permission to go out on the main track?

A. Yes, sir.

Q. Could that light have been taken away from him and the signals and the switches changed, and the signal set for clear on the main track before he stopped?

Mr. Spratt: That I object to. There are several questions involved in one.

The Court: He may answer if he knows.

253 Mr. Spratt: That is all a question of time, your Honor.

Mr. Ward: I don't mean physically able to do it. Of course they were physically able to do it, but I mean did they have any right to do it under the rules and practice of the company?

Mr. Spratt: I object to it, the rules not introduced in evidence and not permitted.

The Court: I will take it.

Mr. Spratt: Exception.

A. According to the rules the signal could have been taken away, but there should not have been any other conflicting movement given until the man who first had the signal was known to be stopped.

Q. So that even if the light was taken away, if they didn't change the switches or signals, a man could still run out on the main track

without encountering any other trains provided they obeyed the signals that they had? Is that correct?

Mr. Spratt: That I object to as calling for the conclusion of the witness. The rules are the best evidence.

The Court: He may answer.

Mr. Spratt: Exception.

A. According to the rules, the man that had the signal, if he didn't notice then that the signal had been taken away, and he kept going right along, why, then there wouldn't have been any damage done. That is what the rule was for.

Q. In railroad practice are you supposed to keep things moving?

254 Mr. Spratt: I object to it as entirely speculative and incompetent.

The Court: What do you mean by that question.

Mr. Ward: Perhaps I better ask him the same question I asked on a previous trial.

Q. Do the block signals at points of this sort supersede everything else and take control when there are interlocking block signals?

A. Yes, sir.

Q. When you have a block signal to proceed, what is it your duty to do?

A. To move.

Q. Is it just as much a violation of the rules to stop when the signals tell you to proceed as it is to proceed when they tell you to stop?

Mr. Spratt: I object to that. The rules are the best evidence.

The Court: Same ruling.

Mr. Spratt: Exception.

The Court: We are proving a general use of these rules in practical railroading.

Mr. Spratt: The railroad might just as well have no rules for its protection, if this thing had been permitted.

The Court: It has been permitted and sustained by other courts, and I am permitting it. Proceed.

(Question read.)

Mr. Spratt: A matter of comparison, he is asking him.

A. Why, I don't know. If you got a signal to go, you
255 would go if there wasn't anything the matter with the engine, or if there wasn't any doubt in your mind. If you were doubtful what the signals were or anything, you would take the safe side and stop until you found out whether everything was all right or not.

Q. In railroad operation, Mr. Peck, when the engineer is pushing cars, do there come times when he has to pass signals at danger?

A. A good many signals are made that way, to come to danger—after the first car gets on a circuit, the signal goes to danger. Then you have to pass it at danger.

Q. What do you rely on then? What governs your movement?

A. As a general rule, we know all those signals.

Q. What governs your movement? What tells you whether you shall go ahead or not?

A. If you had cars ahead of the engine, then the man on the leading car, if he kept signalling you ahead, then you would keep going.

Mr. Ward: You may ask.

Cross-examination.

By Mr. Spratt:

Q. Mr. Kinney, the evidence is that he was running a freight engine at the time of this accident?

A. At this time, I think he was.

Q. And the wages fixed were $3.75 a day according to this schedule for that kind of work?

A. Was it on that kind of an engine? $3.85 on that kind of an engine, wasn't it?

256 Q. (Counsel shows book to witness.)

A. $3.75? That is a type smaller than he had. $3.85 on the class he was running.

Q. This was work trains, ten-hour basis, $3.85. He wasn't on a work train?

A. No, he was on a freight engine.

Q. Switch engine—he was doing switch engine work, switching in the yard at that time?

A. I couldn't say. I don't know anything about this accident at all.

Q. He said he first hauled a flanger and a snow plow——

A. If he went to Tonawanda——

Q. To Tonawanda, and then he came back, and then took a train of coal cars over to Black Rock and was going to hitch onto another train and bring it back to East Buffalo?

A. If he started out and went to Tonawanda, that was outside of yard limits, and that would constitute a road day, and he would get this scale up here (indicating). $4.85 is what I think they paid——

Q. There isn't any $4.85. Freight, the highest is $4.50.

A. Well, that is what he got at that time. He got a freight rate because he went outside the yard limits.

Q. There is three classes, from $4.40 to $4.50 of freight. Do you know which one he was in?

A. He was in freight service that day, because when he went to Tonawanda——

Q. You understand there are three?

A. Class I and K.

257 Q. The first is G?

A. That is freight class, $4.50, and this I and K was ten cents less. It was a lighter class of freight engine.

Q. Than he was running on on that day?

A. That engine he had that day was a G-5, and if he went out on the road he got $4.50.

Q. You don't know how much Mr. Kinney—you don't know how many days during the year he worked, do you?

A. No, I don't know anything about it.

Q. And the amount of money he would earn would depend to some extent on how steady he was, wouldn't it?

A. That would depend on how much he wanted to work, if business was good.

Q. His promotion would also depend upon his skill in operating the engine, would it not?

A. No.

Q. How well he took care of his engine?

A. He didn't have any regular engine.

Q. I meant how he operated the engine he was running.

A. How much he would be able to make?

Q. His promotion. We have got beyond so much per day. But I say his promotion would depend also on the way he took care of and handled his engine, would it not?

A. No, it wouldn't have anything to do with it at all.

Q. So that a man might, because he was fifteen years in the service, and another man was twelve years in the service,
258 that even though a man who was there twelve years, had looked after his engine, never met with an accident, obeyed all the rules, and on the other hand, the man who was there fifteen years, if he had been careless and had run by signals, wasn't reliable when called upon for duty, and was a drinking man, yet you claim that under all those conditions because he was there three years more than the other man, he would get a preference over him in promotion?

A. Well, if he was drunk, the chances are he wouldn't work very long. They would discharge him. They don't want any drunken engineers in the New York Central service.

Q. For instance, where a man has been suspended for running by signals, where a man has been suspended for drunkenness, or a man has been——

Mr. Ward: Mr. Kinney never was in all the years he worked there.

Q. (Continuing.)—Under those conditions do you mean to say that a man because he had been there two years or three years longer than the other man that he would get promoted beyond the other man?

A. We don't have all those conditions.

Q. I say if those conditions did exist—they put you on as an expert, Mr. Peck——

A. He wouldn't work at all if all those conditions existed. He would be discharged.

Q. If one of them existed?

A. If one of them existed.

Q. Yes. I am not putting them all, if you would listen.
259 Understand that I said if any of those things existed?

A. The chances are that he would be out of the service half of the time. He wouldn't be working.

Q. Supposing he was in service at the time the question of promotion came up, do you claim that he would get promotion, that he would be appointed instead of the 12-year old man?

A. I don't think he would. He would be reduced.

Q. So that when you get to the question of whether Mr. Kinney would be promoted here and get the wages that you are getting today, you have to take those things into consideration, don't you?

A. Oh, sure thing.

Adjournment until Wednesday, January 29, 1919, at 10 o'clock a. m.

Wednesday, January 29, 1919—10 a. m.

EDWARD H. PECK resumed the stand for further Cross Examination.

By Mr. Spratt:

Q. Supposing a man had violated some rule, wasn't diligent in coming to work and things of that kind, does that affect his standing?

A. It would if it continued.

Q. And would that put him back of other men who were more diligent than he, had a better record, even though they were younger in the service?

260 A. If the offense was serious enough possibly he might be put down a ways or laid off for a time.

Q. And that would put other men ahead of him?

A. Ahead of him.

Q. You say that you sometimes draw the superintendent's car?

A. Sometimes, yes.

Q. Other engineers also draw it?

A. Just the same as I do.

Q. Just the one—that you happen to be there and you are taken?

A. Yes, sir.

Q. And it is the same way with reference to the pay car? Other engineers draw the pay car?

A. They do when I am not around. That is supposed to be one of the jobs that I had.

Q. But other engineers draw it?

A. They can just as well as I can.

Q. Do you understand the circumstances here at the time of the accident that Mr. Kinney was engineer on an engine which was pushing a caboose ahead of it?

A. I know the circumstances as I have heard them here. I didn't see it at all. I don't know anything about it only what I have heard here in the trial.

Q. And Mr. Kinney testified that Mr. Mullen was standing on

the forward right side of the caboose and was giving him signals, and that the signals that he got from Mr. Mullen right up to
261 just previous to the accident, were easy come-ahead signals; under such conditions he would be about a car length away from Mr. Kinney, would he not?

A. If he stood on the end of the caboose, he would be the car length and the distance from the front end of the engine to the cab away.

Q. What would be the easy come-ahead signal under such circumstances? Will you just tell what it would be?

A. The way the signal is given?

Q. The way that the signal is ordinarily given under such condition.

A. An easy come-ahead signal with a lamp would be made moving the light like that (indicating).

Q. Yes, up and down. About eighteen inches, would you say?

A. About that, or less, yes.

Q. And your hand directly out from the body——

A. That signal could be given down here (indicating).

Q. No, as you illustrated. The illustration given is that you hold your hand horizontal about from your chest, that you have given now?

A. That I just give, yes, I did that way.

Q. You held your hand out about horizontal from your chest, and then you gave——

A. Like that (indicating).

Q. A wrist and arm movement which would bring the lamp up and down about how may inches?

A. Possibly 18 inches, 12 or 18 inches.

262 Q. In a perpendicular up and down?

A. In that case it would be just the small part of a circle. It would have to be.

Q. Isn't it almost up and down as you give it there?

A. Or up and down, yes, that is the rule.

Q. And that would be the kind of a come-ahead signal that you would expect would be given under these conditions?

A. A slow come-ahead signal.

Q. A slow come-ahead signal?

A. Yes, it would.

Q. And that would be a proper signal?

A. That would be a proper signal.

Q. According to the book of rules the stop signal would be a signal swung across the track, would it not?

A. It would.

Q. And according to the book of rules that would be swung across the body in a horizontal manner (indicating)?

A. Yes.

Q. And take a man standing at the end of a car, as it was testified here that Mr. Mullen was, some part of his body at least would be hidden by the front end of the car, would it not?

A. Standing the way Mr. Mullen was——

Q. Assuming that he stood on the beam running across with his back up against the caboose, and his arm and shoulder out, under those conditions a part of his body would be hidden by the caboose, would it not?

A. Most all of his body, if not all, but his arm.

263 Q. To give that signal according to the rule the lamp would at times disappear, would it not (indicating)?

A. In making what kind of a signal?

Q. In making a stop signal according to the rules?

A. Yes, it would have to disappear.

Q. It would have to disappear (indicating)? And assuming that Mr. Kinney sitting in his engine and looking up there and seeing the lights swinging out, and that the end disappearing, at intervals swinging back and forth, so that at the end of the swing it disappeared, that would not indicate a slow come-ahead signal, would it?

A. That would depend on the circumstances.

Q. Well, I am giving you the circumstances there where they were moving along at the rate of six or seven miles an hour, and he was just the caboose length and the part of the engine from the cowcatcher back to where Mr. Kinney was.

A. He could give a stop signal that the light——

Q. No, you remember what I did.

(Question read.)

Q. Under those conditions, and the light swinging as I have indicated in my previous question, that would not be a slow come-ahead signal, would it?

A. That signal you gave us across like that (indicating)?

Q. Across like that, disappearing (indicating)?

A. That would not be a slow come-ahead signal.

264 Q. That would be a stop signal, would it not?

A. That would be a stop signal.

Mr. Ward: Do you mean what Mr. Kinney saw of it or what was actually given?

Mr. Spratt: I have just described.

The Witness: He made the signal for me. It was a stop signal.

Mr. Ward: Across his body?

The Witness: Across the end of the caboose like that (indicating).

Mr. Ward: May I ask, did you mean what Mr. Kinney saw would be a stop signal?

Mr. Spratt: I object to it.

The Court: Yes.

The Witness: The Signal that Mr. Spratt give.

Mr. Spratt: I ask that all be stricken out as not responsive.

The Court: An opportunity will be given for any further examination, and let Mr. Spratt proceed with his examination.

Mr. Spratt:

A. According to the book of rules, a perpendicular signal up and down, a man standing on the end of the caboose as Mr. Mullen was,

then this up and down signal which you have described, about 18 inches, that would always be in sight, would it not, of the engineer in the engine?

A. The way the book describes the come-ahead signal?

Q. And given as you have described?

265 A. That would be a slow come-ahead signal.

Q. And the whole movement of that would be in sight, would it not?

A. Within my view, the way I gave it, it would.

Q. No part of it would disappear?

A. Not the way I gave it.

Q. But when the light disappears, then that indicates something else, doesn't it? The swinging back and forth and the disappearance and reappearance of the light (indicating)?

A. That signal that you gave now would be a stop signal.

Q. Now, Mr. Ward yesterday afternoon drew the blackboard out between you and himself, and went behind the blackboard and gave a signal. Mr. Ward, you say, intended that signal for a what?

A. The way he mentioned it, and I knew what he was giving, that he intended it for a stop signal.

Q. He intended to give a stop signal?

A. He intended to give a stop signal. He did give a stop signal.

Q. Didn't he intend to give a come ahead signal?

A. He intended me to see the part of the signal that he gave for a come ahead signal, and that is the way I saw it.

Q. You saw it as a come ahead signal?

A. I saw it as a come ahead signal.

Q. Whereas he was really giving a stop signal?

A. A stop signal.

266 Q. So that if you had been sitting in the cab instead of on the stand, and Mr. Ward had been out on the end of the caboose giving such a signal as he gave, would you be in doubt what kind of a signal that was?

A. I would be in doubt in this way, that that signal if it differed from the come ahead signal that I was getting, that would be my doubt?

Q. That would be your doubt?

A. That would be my doubt if it was a different signal from what I had been getting.

Q. When an engineer is in doubt what is his duty?

A. To stop.

Q. Now, an engineer is obliged to observe the signals, isn't he, aside from those given by a railroad man, that is, by the hand or by the lamp?

A. The other signals?

Q. Yes.

A. All signals should be observed until you pass them any time that it is possible to do so.

Q. That includes dwarf signals?

A. All signals.

Q. Now, if a man coming along, if a man—for instance, Mr.

Kinney says that at tower I he was told by the towerman to go ahead. That would last how long?

A. That towerman's say-so would be as far as that dwarf.

Q. And when he got to the dwarf then he would have to take his directions—they would all have to take their directions from that dwarf, would they not?

267 A. From that dwarf.

Q. Both Mr. Kinney——

A. And Mr. Mullen.

Q. And Mr. Mullen? And it was proper for them to proceed up as far as that dwarf, wasn't it?

A. Yes, it was.

Q. When they got to the dwarf then their movements would be governed by the dwarf?

A. By the position of the dwarf.

Q. Until they reached the dwarf the towerman had a right under the rules to change that dwarf, didn't he?

A. At any time.

Q. And for that reason they are obliged to be vigilant until they know with reference to that dwarf, are they not, to observe the condition of that dwarf?

A. They would have to be governed by the position of the dwarf.

Q. Now, assuming that the dwarf was at danger, and that Mullen gave the signal to come ahead, what condition would that leave the engineer in, would he be in doubt under those circumstances?

A. That would be a case of doubt and he would have to stop.

Q. Now, assuming that an engineer comes along and knows where a signal is, and doesn't see it, can not see it, what is his duty under the rules?

A. In the absence of a signal where a signal is usually dis-

268 played, or the absence of a light in a place where it is usually displayed, is a danger signal, a signal to stop.

Q. So that it is just as strong as if the purple light at dwarf 6 was against him if he didn't see it?

A. If he didn't see it and knew——

Q. It is just as much of a warning knowing where it is, and if he doesn't see the light then it is a stop signal for him?

A. If he couldn't see the light it was a stop signal.

Mr. Ward: Are you referring to the conditions of this particular case or general conditions?

Mr. Spratt: The general rule.

Q. If an engineer is uncertain what kind of a signal the brakeman is giving him, whether to come ahead or stop, what is his duty under such circumstances?

A. In case of doubt, why, stop.

Q. And ascertain what signals are being given?

A. Yes, sir.

Q. Now, you have given some testimony here about trains where

one car passes along ahead car or cars passing along ahead of the engine, and that it goes to danger. What kind of a signal is that?

A. Why, we have some dwarf signals and home signals also, that after the engine passes a certain distance by the signal the signal will automatically go to danger—dwarf signals and home signals.

269 Q. And those are dwarf signals that are connected up electrically, aren't they?

A. There must be something that makes them go to danger.

Q. This number 6 wasn't of that kind at all, was it?

A. No, that signal wasn't of that kind.

Q. That was a signal that was operated by hand from the tower?

A. It was.

Q. The signals on the main track were of that kind, were they not, at this point?

A. The home signal on the eastbound main was that way.

Q. It was automatic, but not on the Y?

A. As to that I don't remember at that time.

Mr. Spratt: You may examine.

Redirect examination.

By Mr. Ward:

Q. Just two or three questions, Mr. Peck. In answer to Mr. Spratt's questions you testified that the signal that I was giving you—in answer to my questions rather I understood you to say that the signal I was giving you was a proceed signal?

A. That part that I saw.

Q. That you saw outside of the blackboard.

A. That was a proceed signal.

Q. And then as I understood you, in answer to Mr. Spratt's questions you said something about your being in doubt about it. Will you please explain that so that I will understand what you mean?

270 A. He made a stop signal right there in plain view of me, and he asked me what that signal was, and I said it was a stop signal.

Q. Did you refer to the part of it that could have been seen from behind or to the whole signal that Mr. Spratt showed you?

A. The whole signal that Mr. Spratt showed me was a stop signal.

Q. So that I will be clear about it, do I understand that you changed your testimony at all that the part of the stop signal that I gave that appeared outside the board was a proceed signal?

Mr. Spratt: That I object to. It is for the jury to say.

Q. You don't intend to change your testimony on that subject do you?

A. No, I do not. That signal that I saw—the part of it that I saw that you made was a come-ahead signal.

Q. Supposing a man is on the front end of a caboose, and he is giving a stop signal, how does he ordinarily—when the caboose is

between the engineer and himself, what does he ordinarily do, in order to make his stop signal conspicuous?

A. Well, Mr. Ward, as I said before, that different men have peculiar way of giving signals, and if I got a come-ahead signal at Tower I, and then the signal differed as I approached the dwarf, if I was on that engine, so that there would have been a case of doubt in my mind, I would have stopped.

Q. But if it contained the same what would you have done?

271 A. I would have kept on going.

Q. Ordinarily do brakemen when they think their signals are not being read, do they lean out or change their position in some way?

A. Why, they should. If you didn't take their signal, then they would suppose you didn't see the signal, and they would get out where you could see it.

Q. And is it a common thing even for them to get off the car or to come back?

Mr. Spratt: I object to that as incompetent and improper.

The Court: Same ruling.

Mr. Spratt: Exception.

A. The chances are if you didn't move when you got the signal, the man that was giving it would come back to the engine and want to know what was the matter with you, if you were dead or something.

Q. In approaching a dwarf like this, I understood you to say in answer to Mr. Spratt's question that inability to see a signal where one was displayed is a stop signal?

Mr. Spratt: Where one ought to be displayed.

Q. Where one ought to be displayed is a stop signal? In practice does that apply to this situation?

Mr. Spratt: I object to it as incompetent and improper.

The Court: I am going to take this man's experience and practice that he is familiar with as he has been telling us.

272 Mr. Spratt: Exception.

A. The absence of a signal where a signal is usually shown is a danger signal.

Q. Are there different reasons frequently why dwarf signals can not be seen?

A. Sometimes there is, yes.

Q. For instance, if the engine is backing up and the engineer is on the left side of the engine, is he then able to see the dwarf?

Mr. Spratt: I object to that as incompetent and improper, and not under the facts in this case.

The Court: Well, we will take it along with all the rest of the explanation given by this expert on the subject.

Mr. Spratt: Exception.

A. Most all dwarf signals should be viewed from the engine approaching them, and then they would be on the right side as the engine faced the dwarf, that is, the head end of the engine, and on the left side if the tank was toward the dwarf. They would be on the fireman's side.

Q. Here is a case where an engineer is pushing a caboose which is under the rule which was explained to us, which requires them to put a man on the front end, I think you used the expression "to be the eyes of the engineer." Now, under those circumstances, if for any reason the engineer is unable to see the dwarf, but does see proceed signals from his head brakeman, should he then stop, as it was then?

A. No, if that light had been dimmed, or if there had been
273 snow piled up, so that Mullen could see it and I couldn't, I would have kept on going.

Mr. Spratt: I object to that. It is simply a suppositious case. It is not in this case.

The Court: Yes, this is a case based on a supposition of the condition in that light, and he may answer about it, what would be done in that case. He is asked to give as an expert the practice.

Mr. Spratt: Exception.

Q. Or if steam was escaping from the engine Mr. Peck, so that after the light had been once seen green and after Mr. Mullen continued to give proceed signals, would you treat that as an absence of a signal under the rule which requires you to stop?

Mr. Spratt: I object to it as incompetent and improper and speculative.

The Court: Same ruling.

Mr. Spratt: Exception.

A. I would not.

Mr. Ward: That is all.

Recross-examination.

By Mr. Spratt:

Q. Do you mean to say that after you had seen that light when you were four or five hundred feet away, and your view by steam obstructed that light, that you would have a right to run by it?

Mr. Ward: No, that is not a fair question, he has asked Mr. Peck. My question was including the head end brakeman——

Mr. Spratt: You have no right to frame my questions.
274 The Court: This is Cross-examination. He may go on and cross-examine this witness.

Mr. Ward: This matter as to what ought to be done?

Mr. Spratt: I don't care to hear any——

Mr. Ward: May I address the court?

Mr. Spratt: I don't care to have him post this witness by his talk.

Mr. Ward: I object to the counsel cross-examining the witness on this subject for this reason: I put Mr. Peck on the stand here to prove certain things. I didn't ask Mr. Peck what he would have done under any given state of circumstances. Mr. Spratt asked him that, and brought out what Mr. Peck thought ought to be done under those circumstances there, which ordinarily would not be competent proof because it puts Mr. Peck in the place of the jury, but I didn't object to it. I let Mr. Spratt go on, and then I supposed that was a new subject, and I thought I was at liberty to cross-examine Mr. Peck because Mr. Spratt had opened up a new subject. I submit that on that subject on which Mr. Spratt has made Mr. Peck his witness, he is not at liberty to cross-examine Mr. Peck.

The Court: I am going to take this man's practice as an
275 expert. Both sides have gone into it, and I am going to take it.

(Question read.)

Q. From that time on he would have a right to run by it without knowing whether the signal had changed or not?

A. If I didn't know whether the signal had changed or not, I would have took the first view I had of it along on with Mullen's signal.

Mr. Spratt: I ask that that be stricken out. He has put in a condition. Answer my question.

The Court: If you can't answer it, say you can't. You are not obliged to answer if you can't.

(Question read).

A. What light?

Q. This dwarf light that we are speaking of here.

A. Then I would keep on going if I seen it clear once.

Q. If you saw it clear once, even though you were four hundred or five hundred feet away——

A. Four or five hundred feet away, yes.

Q. And couldn't see it there after, you would run right by it? You wouldn't stop there?

A. No, I wouldn't stop.

Q. Then what becomes of the rule where you don't see a light?

A. I have already seen the light.

Q. But you have told me that the man in the tower had the right to take that light away from you any time before you reached it?

276 A. He has, but not to give a conflicting movement.

Mr. Spratt: I ask that latter part be stricken out.

Mr. Ward: I submit that that is responsive.

The Court: That may stand.

Mr. Spratt: Exception.

Q. What do you mean by a conflicting movement? I haven't asked you about a conflicting movement, have I?

A. No, but you want to make me say something that will get me into trouble.

Q. I don't want you to get into trouble. I want you to tell the jury what there is about this. It is because you don't want to be fair.

A. Yes, I am not interested in this case.

Q. You are always adding and quibb-ing.

A. I am not interested in this case.

Q. Yes, you are very much.

The Court: If there is any lecturing to be done to the witness, that is the duty of the court. The lawyers should call the attention of the court and ask the court to lecture the witness.

Mr. Spratt: I hope the court will now. I ask you to.

The Court: But the lawyer must not himself lecture the witness.

Mr. Spratt: If I did, I am sorry, so that I shall ask the court to tell the witness to respond.

277 The Court: You answer these questions. I think I explained to you what the rule was on cross examination, didn't I?

The Witness: You did.

The Court: It is that the witness must answer the questions just as they are put to him. If you can't answer or don't know or don't remember, just say so, but answer those questions that are put to you, and don't add something, don't modify it at all.

Q. I have not asked you anything about conflicting movements, have I?

A. No, you didn't. I can't answer your question.

Q. You have answered it.

Mr. Spratt: I ask that latter part be stricken out.

The Court: Strike it out.

Q. Just answer me. If you were a woman I would understand you would have to have the last word, and I wouldn't insist.

The Court: Now, you are lecturing the witness, that if he were a woman there might be something else going on here.

Mr. Spratt: I can't help it, Judge, with this witness.

The Court: Proceed, and let the witness follow the instructions of the court as to cross examination.

Q. Now, I will put my question and leave out with reference to any conflicting movements. I said, isn't the rule that if you reach a point where a signal should be displayed, and you don't see it displayed, it is your duty to stop?

278 A. It is.

Q. So that even though you were four or five hundred feet away from this dwarf 6, saw it at that point, proceeded on, and you were enveloped in a cloud of steam so that you couldn't see where it was, you would go by that signal?

A. I would.

Q. Even though you didn't know whether it was purple or green?
A. Oh, if I knew it was purple, I would stop.
Q. If you didn't know?
A. If I didn't know——
Q. Under those conditions you wouldn't know whether it was purple or green, would you?
A. I had seen it green.
Q. You had seen it, but you told me the tower man had a right to take that signal away from you any time before you reached it, didn't you?
A. Yes, but that is only part of the rule.
Q. Just one step at a time. That is so, isn't it?
A. There isn't one step there. That rule is just one rule, and it makes a stipulation how he can take it away from you.

Mr. Spratt: I ask the court to tell him to stop lecturing.
The Court: Just answer his questions.

A. I can't answer it.

The Court: Say you can't, but don't try to answer something else.

Q. Under those conditions which I have given you, you would go right by that signal without knowing what its color was?
279 A. I would.
Q. When Mr. Ward was behind the board here and gave you the signals last night, did Mr. Ward ask you, "How did you know that I was giving a stop signal?" and did you answer "The part that I saw of your signal was a come-ahead signal, but the light disappeared so long that I surmised that it was a stop signal although I could see part of it under the board there."? You testified to that yesterday?
A. I did. I believe I did.
Q. That is true, isn't it?
A. To the best of my memory.
Q. That is true, isn't it? Now, if all the signals that were given by a brakeman on the head of a caboose under these circumstances—all disappeared and reappeared, that at least would leave you in doubt as to whether they were come-ahead or stop signals, would they not?
A. They would, yes.
Q. And under such conditions it would be your duty to stop, would it not?
A. It would.

Mr. Spratt: That is all.
Mr. Ward: That is all.

GEORGE F. DOUB was re-called as a witness in behalf of the plaintiff:

Direct examination.

By Mr. Ward:

Q. Mr. Doub, you were a yardmaster and conductor in 1908, and the years previous to that, as I understand you?
280 A. Yes, sir, and after that time.
Q. Are you familiar with the way in which the trains were operated and signals given?
A. Yes, sir.
Q. This signal in the book of rules, proceed signal, shown on page 87, which has been marked in evidence, (showing book to witness) I suppose you have seen that in the book, haven't you?
A. Oh, yes, sir.
Q. Is that the way the signal was given in practice?
A. No, sir.

Mr. Spratt: I object to it, as incompetent, immaterial and improper.
The Court: We have allowed the other witnesses to give their experience, so that I will allow this witness to testify as to the practice in railroading at that time under the rules.
Mr. Spratt: Exception.

Q. Is this (Showing to witness) an ordinary railroad lantern?
A. A New York Central lantern now in use, I believe, that style.
Q. Will you take that lantern and show the jury how the book calls for that signal to be given?
A. The book calls for the signal to be given this way (illustrating).
Q. How was it given in practice at that time?
A. (Witness illustrates).
Mr. Spratt: Let us get it down by agreement. The first
281 signal witness indicates by his hand about out at the shoulder, and raising it up and down about what distance?
The Witness: In a vertical position.
Mr. Ward: In a vertical position from his knee to the height of his shoulder.
Mr. Spratt: And that is the come ahead signal?
Mr. Ward: As given in the book. As given in practice—do that again.
A. (Witness illustrates.)
Mr. Ward: As given in practice you swing the lantern up——
The Witness: That is an ordinary signal.
Mr. Spratt: He swung the lantern from his knee up to the top of his head or over his head?
The Witness: For an ordinary signal like this (illustrating). Conditions change sometimes.
Mr. Ward: Standing right there, show us a stop signal given in ordinary practice.
A. (Witness illustrates.)

Mr. Ward: You are swinging the lantern across your body at right angles with the position in which you stand?

The Witness: Facing the engineer.

Mr. Ward: You are giving it as you would stand facing the engineer?

The Witness: Facing the engineer.

Mr. Spratt: Supposing you had——

Mr. Ward: Wait, I haven't got through yet. He indicates
282 swinging the lantern across his hips to his waist.

Mr. Spratt: And about how far?

The Witness: This is an ordinary stop signal under ordinary conditions. (Illustrating.)

Mr. Spratt: Would you say about three feet from his side?

Mr. Ward: Swings out two or three feet from his side—either side.

By Mr. Ward:

Q. A harder stop signal is what?

A. Do you want what they call a wash out?

Q. Give us a harder stop signal.

A. Here is a harder stop signal. (Indicating.) Facing the engineer all the time. This bail is a little bit crooked.

Q. You are swinging now across your body, raising the lantern as high as your head on either side?

A. Yes, you are pretty mad when you do that.

Juror No. 8: Does that mean stop quick?

A. Yes, sir.

Q. Were you familiar with this rule 102 governing the operation of an engine when it is pushing a car, Mr. Doud, "When cars are pushed by an engine or a motor, (except when shifting and making up trains in yards) a flagman must take a conspicuous position on the front of the leading car"? Were you familiar with that?

A. Yes, sir.

Q. What was the practice in reference to pushing a car or a number of cars, with a brakeman in that position, if for any
283 reason the engineer was unable to see the fixed signals? How would he operate his train?

Mr. Spratt: I object to that. The rules govern. They are the best evidence.

The Court: We are taking the testimony of these various witnesses of the way the thing was done in actual practice under the rules.

Mr. Spratt: Exception.

A. Start me off right. How many cars are we handling in this imaginary movement?

Q. I say, one or any number.

Mr. Spratt: I object to it. There is one car involved here, and I ask that it be confined to that.

The Court: Yes, there is only one here.

Q. I will confine it to one.

A. The idea is, with one car or more than one car—five or six cars—for the lantern to be swung that way. The men would have to be placed—the more cars you have the more men in order to properly give the signals.

Q. If for any reason the engineer is unable to see the signal, and he is pushing one car with a man on the head end of it, how is it customary to operate that train?

A. He will take the signals of the man who is doing the seeing for him.

Q. You were familiar with the locality there, weren't you?

A. Yes, sir.

Q. If that dwarf showed green as you approached it, even
284 as far back as Hertel avenue, what did that indicate?

A. If that showed green as far back as Hertel avenue, or further back if you could see it, it indicated you had a clear movement.

Q. And a right to do what?

A. A right to proceed.

Q. How far?

A. In that particular case you would only have the right to go up to this semaphore, because you would be going against the current of the traffic after you made this movement.

Q. You would have to get another signal there?

A. Yes, you couldn't go any further than that point. (Indicating).

Q. You indicate semaphore lock marked on the map as being at switch 8?

A. I*t* that is the number of it. I don't know the number of it.

Q. At a point near the tower, is that it?

A. Yes, sir.

Q. If a signal is once given to an approaching engine or train, does that mean that the switches are also arranged, where there is an interlocking system?

A. Do you mean if that dwarf signal shows green?

Q. Yes.

A. Why, they must be arranged——

Q. That is, if the thing is working all right?

A. That is the idea.

Q. And under the rules and practice of the company at that time can a conflicting movement be permitted until the man
285 who is approaching comes to a stop?

Mr. Spratt: I object to that, as incompetent and improper and speculative, the witness not competent.

The Court: He may answer.

Mr. Spratt: Exception.

A. No, sir.

Mr. Ward: Your Honor there is another point that I want to examine Mr. Doud on, and which is properly in rebuttal. Mr. Spratt in his opening has stated that this was an automatic machine, and

that if the lights showed safe on the main track then they must have shown "stop" or purple on the Y.

Mr. Spratt: Provided the machine was in good shape.

Mr. Ward: Yes, provided the machine was in good shape. But, as I understand it, he expects to make proof that the machine was in good shape at this time. Am I correct about that, Mr. Spratt?

Mr. Spratt: Yes.

Mr. Ward: Mr. Doud is now a farmer and he lives out in Springville, and he is in here at considerable sacrifice to himself, and I would like to ask him in rebuttal certain questions on the sticking of these dwarfs at various times, from failure to operate. Have you any objection to that?

Mr. Spratt: Yes, it may not be competent at all as the case goes on.

The Court: Under objection I could not allow it.

286 Mr. Ward: I realize that. It is out of order. It only saves me the necessity of making Doud's wife feed the cows another day.

Mr. Spratt: I would like to accommodate him, but it is evidence that may be entirely incompetent as the case goes on.

The Court: Very well.

Mr. Ward: That concludes my examination for today.

Cross-examination.

By Mr. Spratt:

Q. You have given the signals, have you, for the starting and stopping?

A. Yes.

Q. And the stopping signals did not cross the body? They were from the leg out?

A. The stopping signals didn't?

Q. No, I mean the proceed signal was always from the body out?

A. About from the shoulder down to the knee.

Q. It didn't cross the body at all?

A. Not in ordinary signal.

Q. But the stopping signal crossed the body in the movements?

A. It crosses both legs, properly given.

Q. So that assuming a man standing on the end of the car, as you have heard testified that Mr. Mullen was standing on the end of the caboose, and giving signals outside, the signals which you gave, assuming that he was standing with his arm outside, the come-

287 ahead would be outside his body, would it not, would be in sight all the time to the engineer?

A. Most all of his body would be obscured except his arm.

Q. And the light, the come-ahead signal as you have given it would be always in the engineer's view, would it not?

A. That would be possible, but different men have different modes of giving signals.

Q. I mean the ordinary signal as you have given it here?

A. Yes.

Q. The come-ahead signal, the light would always be in the engineer's view?

A. I don't know what kind of a signal Mr. Mullen gives, but in ordinary practice, yes, sir, I will say that.

Q. In the ordinary practice the come-ahead signal would always be in the engineer's view, the full signal as you have given it here, wouldn't it?

A. I don't know how Mr. Mullen was standing on that caboose.

Q. I am not asking you about Mr. Mullen, but as you have given it here——

A. If I gave that signal, and was standing in the position that Mr. Mullen should have stood, and——

Q. It would be in view? Nearly all of the——

A. Except the part where he got by the end of the caboose.

Q. Supposing that he was standing so that he was by the
288 edge of the caboose—supposing your body was standing so that you were right at the end, and your arm extended out, shoulder out, as you gave the signal, come-ahead slow, the whole signal would be in view of the engineer?

A. No, sir, I don't think it would.

Q. You don't think it would?

A. I know it wouldn't. I have run a train on the New York Central myself, and I know that it would not.

Q. As you have given it here it would be in the view of the engineer?

A. It would be nearly a physical impossibility to do that.

Q. Just step out here and do that?

A. Standing here is not standing on the platform of the caboose.

Q. I am asking you to stand right there).

A. (Witness swings lantern.)

Q. Is that a stop signal?

A. That is a go-ahead signal facing the engineer.

Q. Didn't you give it here, and didn't we describe it as being out here about horizontal (indicating)?

A. That is the way the book gives it.

Q. That is, that was the signal?

A. That is the way the book gives it. You would put your lamp out if you did that.

Q. A slow signal?

A. It would have to be very slow.

Q. Slow come-ahead signals?

A. And the weather conditions would have to be perfect.

Q. You heard them read here, the wind seven to nine
289 miles an hour?

A. I don't speak about this particular case. I am speaking about what a lamp will stand.

Q. That is the ordinary slow come-ahead signal, isn't it? (indicating).

A. No, it is not, not the way you are holding the lamp.

Q. You claim, do you, that you would swing it across your body?

A. For a go-ahead signal?

Q. For a come-ahead signal?
A. Here is the movement (illustrating). I have given it right along, nearly all the time.
Q. Down to your leg, did you not?
A. About to your leg. You can't hold it here (indicating).
Q. That is, as you swing it now, you swing it right across your body?
A. You have got to bring it some place.
Q. As you swung it now you swung it across your body?
A. No, that is only to let the lamp fall.
Q. You swung it across your leg there?
A. When you are giving a signal you want to face the engineer. You don't want me to break my knee when I am doing it.
Q. No, give the stop signal as you are there.
A. Facing the engineer?
Q. Just as you are now?
A. (Witness illustrates.)

Q. Didn't you swing it up to about your shoulder?
290 A. That is a different signal. That is what they call the wash out signal.

Q. The first illustration that you gave of a stop signal, didn't you swing it out?
A. You and Mr. Ward agreed on the length it came from each end. You agreed on three feet.
Q. About three feet out? You swing it out about three feet?
A. I am not a very good judge of distance, (Witness swings lantern). Is that three feet? That is as near as I can give it.
Q. And so that if you were standing at the end of the car, as it is said that Mr. Mullen was, you couldn't tell, could you, which signal was being given?
A. You couldn't tell?
Q. Yes.
A. You could see nearly all of the go-ahead signal except that part that the outline of the caboose——
Q. Each signal would pass out of sight of the engineer, would it?
A. Part of that signal.
Q. A part of each signal would pass out of sight of the engineer?
A. A part of it.
Q. Of each one of the signals, of the stop and the proceed?
A. Yes, sir.
Q. And according to what you say——
A. The way I give them. I don't say Mr. Mullen gives them that way.

Q. The way you have given them a part of each signal
291 would disappear from the view of the engineer?
A. If he gave them with the same momentum that I have given them, I would say that.
Q. That a part would disappear, and then the only difference would be that you would swing the stop signal up a little higher than you would swing the go-ahead signal?
A. But it is a little more difficult——

Q. Which one would you swing a little higher than the other?

A. Why, your proceed signal must be higher than your stop signal.

Q. That is the only difference as you have given it here, isn't it? That is the only difference in the signals as you have given them here, that the proceed signal is swung up a little higher than the stop signal?

A. Quite a little higher.

Q. Quite a little higher?

A. Quite a little higher, the difference from your shoulders to your knees. A stop signal is supposed to come up to your knees under ordinary conditions, and a go-ahead signal starts from the knee.

Q. And when you get them going, they are the same, except one comes up a little higher than the other, as you have given them here?

A. About three foot higher. You would have different starting points.

Q. But when you once get it started the motion is the same, isn't it?

A. No, this motion (indication) is not the same as that motion (indicating).

292 Q. As you have given it here?

A. As anybody would give it.

Q. Just one other thing. You were here in court when Mr. Peck gave this signal, weren't you?

A. Yes, sir.

Q. And the slow come-ahead signal—you saw that, didn't you, that Mr. Peck gave?

A. I don't know that I saw that particular signal. If you will kindly explain it to me——

Q. He illustrated by raising it perpendicular up and down 18 inches, and with his arm about opposite his chest.

A. With the bail of the lamp like this (indicating) that don't make the lamp go vertical.

Q. Did you see the signal given by Mr. Peck that I have just described?

A. I seen the signal, yes.

Q. Did he describe the signal properly?

A. He also described——

Q. Was that a proper description of the signal of slow come-ahead?

A. Yes, as he described it. But you are——

Q. That is all I am asking you. You say that someone invited you back to work for the New York Central?

A. I will say that, yes.

Q. Who was it?

A. Superintendent Fleming.

Q. When?

A. I believe I had a letter in March; something like that.

Q. Have you got the letter?

293 A. No, I haven't.

Q. Mr. Fleming is not here now?

A. I believe he is superintendent at Albany. You know more about that than I do.

Redirect examination.

By Mr. Ward:

Q. Mr. Spratt interrupted you when you were making some explanation of Mr. Peck's signal?

A. Mr. Spratt didn't say anything about the wrist movement that Mr. Peck called his attention to.

Mr. Spratt: I merely asked you if you saw the signal that Mr. Peck made.

A. I said that, yes.

Mr. Ward: Let me finish.

Q. The signals which you gave to the jury as the customary proceed and stop signals you said were given when you were facing the engineer, didn't you?

A. Yes, sir.

Q. Now, supposing you are not facing the engineer, and there is a caboose between you and the engineer, and you are on the front end of the caboose, then what is the customary stop signal? Call this (indicating) the front end of the caboose, if his Honor will excuse the witness for turning his back a moment.

A. This, (indicating) is the front end of the caboose. Here (indicating) is the railing——

Q. We will call the Justice's bench the front end of the caboose, and here (indicating) is the railing.

A. You step out on this beam here (indicating). Here is
294 your step to come up on each side (indicating). You have to step out on this railing (indicating) and have this hand (indicating) a hold of something to reach out, in order to give that signal.

Q. How do you give that signal under those circumstances?

A. You give it like that (illustrating).

Q. You hold out your arm, and you are swinging the lantern crossways?

A. That is it.

Q. Hold out the arm as far as you can, and swing the lantern——

A. You have a pretty good hold so you don't fall.

Q. So that it is passing crossways? In reaching out that way, do you put most of your body out?

A. You don't really lean out any farther than you have to.

Q. How would you give a proceed signal under the same conditions?

A. (Witness illustrates.)

Q. You are reaching out and swinging the lantern up and down?

A. Yes, sir.

Q. In that latter movement, the proceed signal, you were describing a part of the arc of a circle with the lantern?

A. Yes, sir.

Recross-examination.

By Mr. Spratt:

Q. So that the proceed signal that you have given here, assuming that you were standing at the side of the caboose, as described,
295 the movement of the light is entirely outside of the caboose, isn't it?

A. If the man is supple enough to get out there, yes. Here is the end of the caboose——

Q. You give that signal?

A. (Witness illustrates.) That is a proceed signal.

Q. When you gave it before you didn't bring it back in front of you though?

A. I can't do it every time to the fraction of an inch.

Q. The first time you gave that signal, before I called your attention to its being outside of the caboose, the whole movement of the light was outside of the side of the caboose as you stood there, wasn't it?

A. That might have been possible.

Q. And when you gave the movement to stop as you stood there, then the light would swing inside of the caboose? The end of the swing would be inside the caboose, would it not, or in front of the caboose?

A. Part of both signals would be——

Q. Just answer my question.

A. I can't answer that question.

Q. Just stand right up there again where you stood before. Now, Mr. Doud, just give the stopping signal as you said?

A. (Witness illustrates.)

Q. Supposing that is the end of the caboose.

A. (Witness illustrates.)

Q. Supposing I was back there, or Mr. Kinney was back
296 there, then part of that movement would be obstructed from his view by the end of the caboose, would it not?

A. Of that particular signal, yes, if he continued it that far.

Q. So that under those conditions, the stopping signal, a part of it would be obstructed by the end of the caboose, and could not be seen by the engineer? Isn't that right?

A. If he gave it that way.

Q. As you have given it here.

A. If Mr. Mullen gave it the way I gave it.

Mr. Spratt: Strike that out.

A. As I gave it, yes, sir.

WILLIAM P. CARROLL was duly sworn as a witness in behalf of the plaintiff:

Direct examination.

By Mr. Ward:

Q. Mr. Carroll, you were the head man at the round house where Mr. Kinney's engine, 2499, was taken, on the 8th of October, 1908, were you not?
A. Yes, sir.
Q. And what was your position there?
A. I was general foreman.
Q. And you remained in that position with the New York Central for how many years?
A. Why, I think I remained two or three years after that at that point.
297 Q. And then you went for the New York Central somewhere else?
A. I went to Rochester as master mechanic.
Q. And then you went to Albany?
A. To Albany as master mechanic.
Q. And then you entered the government service, didn't you?
A. I am with the United States Shipping Board at present.
Q. That is what you are doing now?
A. Yes, sir.
Q. Down in Philadelphia?
A. Yes, sir.
Q. Building ships?
A. Helping.
Q. When you worked there did you know this engine, 2499? Were you acquainted with it?
A. Why, only that we had such an engine with many others.
Q. How many engines did you have running in and out of your roundhouse at that time?
A. Why, my recollection is we had something like 60 or 80—that number.
Q. This was a round engine, wasn't it?
A. It was a G-5 engine, which was used as I recall in road service.
Q. A freight engine?
A. Yes, sir.
Q. One of the large type of engine?
A. At that time the heaviest type of freight engine.
Q. At the time of this accident it was being used as a switch engine, wasn't it, in yard service?
298 A. We had a number of engines running from Buffalo to Suspension Bridge, what they call bridge runs, and that engine was used part of the time at least in that service.
Q. When an engineer is called to go out with an engine does he pick the engine out or does somebody pick it out for him?
A. That is done by the force at the engine house.

Q. Are you the man who picks out the engine?
A. We have an engine dispatcher who selects the engine.
Q. He is under you?
A. Yes, sir.
Q. So that when the engineer gets down to the roundhouse he finds the number of the engine put on the blackboard, doesn't he?
A. That was our custom at that time, yes, sir.
Q. And you or somebody under your assigns a fireman to him?
A. Yes, sir.
Q. He doesn't pick out his own fireman?
A. No.
Q. When the engineer gets down there to the roundhouse the engine is supposed to have steam up and be in suitable condition for his use, isn't it?
A. Yes, sir.
Q. Supposed to be in proper repair and safe to operate?
A. Yes, sir.
299 Q. You were familiar with the regulations of the Public Service Commission of the State of New York in force at that time, were you not, Mr. Carroll?
A. I was.
Q. And were you operating under them?
A. Yes, sir.

Mr. Ward: Mr. Spratt, I am referring to page 63 of the minutes of the last trial.

Q. Were you familiar with rule No. 11, entitled "Steam leaks," Mr. Carroll? (Showing book to witness).
A. I was.
Q. Does that rule read as follows——

Mr. Spratt: I object to the rule as not the reason—there is nothing here proved defective in this engine that brings it under that rule.
The Court: I don't know what the rule is yet.
Mr. Spratt: Let the court look at it and see.
Mr. Ward: This is a regulation of the Public Service Commission.
The Court: You mean a regulation of the Public Service Commission?
Mr. Ward: Of the State of New York.
The Court: It has the right, hasn't it, to regulate these?
Mr. Ward: I think we conceded that the Public Service Commission under the Public Service Law are authorized to adopt regulations governing the operation of boilers and steam engines?
300 The Court: Is that conceded?
Mr. Spratt: Yes, I don't dispute that, but I dispute the rule. There is nothing proved here that would make that rule competent. I meant there is nothing proved in this case that makes that rule competent. It is relevant to this case.
The Court: I will overrule the objection.
Mr. Spratt: Exception.

Q. Does that rule, which was adopted by the Public Service Commision of the State of New York, and under which you were operating at that time, read as follows: "If a serious leak develops under the lagger, an examination must be made, and the leak located. If the leak is found to be due to crack in the shell, or to any other defect, which may reduce the safety, the boiler must be taken out of service at once, and thoroughly repaired before it is reported to be in a satisfactory condition". Was that rule in effect at that time, Mr. Carroll?

A. It was.

Mr. Spratt: Now, I renew my objection, and ask that it be sticken out.

The Court: Motion denied.

Mr. Spratt: Exception.

Q. Were you familiar with "B, Article 11"? Was this rule in force at that time?

Mr. Spratt: Same objection.

The Court: Same ruling.

Mr. Spratt: Exception.

Q. (Reading.) "B. Article 11. All Steam valves, cocks
301 and joints, studs, bolts and seams, shall be kept in such repair that they will not at anytime emit steam in front of the engineer so as to obscure his vision." Was that in effect at that time?

A. It was.

Mr. Spratt: I ask that that be stricken out.

The Court: Denied.

Mr. Spratt: Exception.

Q. And you were operating under it?

A. Yes, sir.

Q. And understood it?

A. Yes, sir.

Q. When an enginer brings an engine in at the end of a day's run he is supposed to make a report about it, isn't he?

A. That was our practice at that time.

Q. And you have a blank form which you furnish to engineers to make reports on?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. And they make out those reports, and sign them, and you turn them over to whom?

A. Why, the foreman of the different departments, the work that they were particularly interested in, and which was in their charge, and arranged for the repairs.

Q. Was this engine in use during the month of September and October up to the time of this accident?

A. I don't remember.

302 Q. If it was in use there would be work reports about it, engineers' reports?

A. At some point, yes, sir.

Q. Was that engine taken out of service for the purpose of making repairs, or any other purpose, at any time during the months of September or October prior to the accident?

A. I can't answer that without going into detailed explanations as to just what the term "out of service" means.

Q. Was it taken off its regular business and taken apart?

A. Well, at the completion of each day's work or trip the engine would come into either that engine house or some engine house controlled by the New York Central Company, and at such time certain repairs would be made.

Q. Have you any personal knowledge of any repairs being made on this engine—any personal knowledge?

A. No personal knowledge.

Mr. Ward: I call on the defendant to produce the reports of enginemen as to the condition of this engine prior to Mr. Kinney's injury.

Mr. Spratt: These are the only ones we have or were ever able to produce. (Handing papers to Mr. Ward.)

Mr. Ward: The defendant produces three, a report of engineman Fox, dated October 1st, 1908, a report of engineman Ames, dated October 4th, 1908, and a report of engineman Cook dated October 5th, 1908.

303 I offer these three reports in evidence.

Mr. Spratt: I object to them, as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Spratt: Exception.

(The three reports above referred to received in evidence, and marked "Exhibits 7, 8 and 9").

Q. Do you know where the other reports are, Mr. Carroll?

A. I do not.

Q. I hand you Mr. Fox's report which has been offered in evidence. It is that kind of a paper that Mr. Fox would turn in to you when he got through with his work, isn't it?

A. Well, not necessarily to me.

Q. Or to some of your subordinates?

A. Not necessarily. This particular report is dated "De Witt." That is a point near Syracuse.

Q. Either to you at your roundhouse or some other roundhouse? That particular report is made to the roundhouse where?

A. De Witt.

Q. That is near Syracuse?

A. This is the eastern terminal of what was then known as the western division, east of Syracuse.

Q. When Mr. Fox turned that engine into the round-house on the

first of October, or eight days before this accident, did he report under item 13 that the crown sheet of the boiler was leaking?

A. He did.

304 Q. Did he report under item 17, "Flues leaking"?

A. Yes, sir.

Q. Did he report "Flues stopped"?

A. Yes, sir.

Q. Did he report under item 29, "Steam pipes leaking"?

A. Yes, sir.

Q. Did he report under item 66, "Rod bushings examine"?

A. He did.

Q. Did he report under item 71, "Valves blowing"?

A. Yes, sir.

Mr. Spratt: You don't mean a report. You are reading the printed report.

Mr. Ward: I am reading what he reported—put a check.

Mr. Spratt: He doesn't report valves blowing, but he puts a check after.

Q. You have on this blank all the usual defects that exist on the engine, haven't you?

A. That was our practice.

Q. And then if any particular defect develops you put a cross mark opposite that particular thing like "Valves blowing" or "valves out of square"? A cross mark indicates that particular defect, doesn't it?

A. The cross mark indicated that that particular portion of the engine needed attention.

Q. Then anything extra is put in at the bottom under the head of "Other defects," isn't it?

A. Yes, sir.

305 Q. So that you find under item 71, where on your form it says "Valves blowing," you find a check mark?

A. Yes, sir.

Q. He also reported item 72, valves out of square, did he not?

A. He did.

Q. Under the head "Other defects" did engineer Fox report on the 1st of October "engine does not steam, repair jacket under the boiler"?

A. This report would indicate so, yes.

Q. Have you any personal knowledge as to whether or not any of these defects were repaired, Mr. Carroll?

A. It was 150 miles from where I was located. I have no personal knowledge.

Q. Now I call your attention to the next report which you have furnished me here, which is on the 4th of October. Do you know where that engine was on the 2nd or the 3rd of October, or who had it?

A. This report is dated Rochester, engineman H. Ames.

Q. Do you know where it was on the second or third, or who had it?

A. I would assume it was enroute from Dewitt west in the interim between the first and the fourth.

Q. Do you know anything about that?

A. I do not.

Q. Now, I show you a report which they furnished me on October 4th. (Showing to witness.) That you say is from Rochester?

306 A. Yes, sir.

Q. And it is made by engineer Ames, is it?

A. It is.

Q. Did engineer Ames on the 4th of October, under item 13, did he report "Crown sheet leaking"?

A. Yes, sir.

Q. Did he report item 17, "Flues leaking"?

A. Yes, sir.

Q. Did he report item 18, "Flues stopped"?

A. He did.

Q. Did he report item 28, "Stay bolts leaking outside of cab"?

A. Left side.

Q. Outside of cab, left side?

A. Yes, sir.

Q. Did he report item 29, "Steam pipes leaking, blow"?

A. Yes, sir.

Q. Did he report item 42, "Cylinder cocks and rigging, R. F."?

A. He did.

Q. What does that mean?

A. Right front. There are four of them, two of them on each side.

Q. Did he report under item 66, "Rod bushings L. B."?

A. Yes, sir.

Q. What does that mean?

A. Left back, just showing which particular bushing.

Q. Did he report under item 71, "Valves blowing, both valves"?

307 A. Yes, sir.

Q. Under the head of "Other defects" did engineer Ames report, "Caulk leak under belly of boiler. Smoke box door leaks air."?

A. Yes, sir.

Q. That was three days after the other, wasn't it?

A. Yes, sir, October 4th, three days.

Q. Those were substantially the same things that the other men reported?

A. No, some of the items——

Q. Some more?

Mr. Spratt: Some less.

Mr. Ward: I haven't seen any less.

Q. You have no personal knowledge whether any of those defects were ever repaired, have you?

A. No personal knowledge.

Q. The next one that has been furnished to me was the report of October 5th, which was the next day, engineer Cook. (Showing to witness.) Did engineer Cook report item 13, "Crown sheet leaking"?

A. Yes, sir.

Q. That item had been reported by Mr. Fox on the 1st and Mr. Ames on the 4th, hadn't it, the same item? (Showing to witness).

A. It had been reported both days.

Q. Item 17, this last man, Cook, did Mr. Cook report "Flues leaking"?

A. Yes.

Q. That had been reported on the 4th, and it had been reported on the 1st, had it?

A. It had.

308 Q. Did he report, "Flues stopped", 18?

A. He did.

Q. That had been reported on the first and on the fourth, hadn't it?

A. Yes, sir.

Q. Where was that report made to?

A. This was made at East Buffalo.

Q. At your house?

A. Well, there were two houses at East Buffalo. The house at which I was located and also the old house—what we call the old house. I believe this was made at the old house.

Q. Have you any personal knowledge of any repairs having been made under that last report?

A. No, sir, as I was not at that point.

Mr. Ward: I think that is all.

Cross-examination.

By Mr. Spratt:

Q. You are not now in the employ of the New York Central?

A. I am not.

Q. And you were in charge at the time in question of the West Shore round-house?

A. Yes, sir.

Q. At East Buffalo?

A. Yes, sir.

Q. And how many stalls were there in the round-house?

A. There are 30 stalls in the house.

Q. Did you keep there gangs for making repairs on the engines, minor repairs?

A. We did.

Q. Were there day and night gangs?

309 A. There were about 150 or more men distributed day and night.

Q. You say it was customary for the engineers when they came in with their engine after a day's fun to report the condition of the engine and as to what was needed for repairs?

A. If repairs were needed, they reported.
Q. Were those reports kept on file in the roundhouse for a certain period of time?
A. As I recollect it was our custom to keep them for a 30 days.
Q. And after that where were they sent?
A. They were sent to the master mechanic's office.
Q. Where was that located?
A. His office was located at East Buffalo, at what we call the New York Central or old house.
Q. And from there the reports were sent where?
A. I have always understood they were sent to the assistant superintendent of motive power's office at Depew.
Q. This accident happened in 1908. Sometime after the accident did you understand that there was a fire at Depew in the office of the assistant master mechanic?
A. My recollection is that there were two fires there, that this same building burned twice.
Q. Did you understand that the reports of this kind were destroyed that were out there in the fire?
A. Yes, sir.

Mr. Ward: You don't contend but what those fires occurred after the first trial, do you?
310 Mr. Spratt: No, I don't.
Mr. Ward: It was after the first trial?
Mr. Spratt: After the first trial.
Mr. Ward: And these three reports which you produced were produced on the first trial?
Mr. Spratt: They were. I understand they were.

Q. I show you these reports that the counsel has examined you on, and ask you if you see after these items that the counsel has referred to as needing repairs—what do you find after each of them? (Showing paper to witness.)
A. A check mark calling attention to that particular item.
Q. That is a cross in a circle after the different items?
A. Yes, sir.
Q. And after that what do you find, the next line, under the head of——
A. A name—a man's name.
Q. What does that indicate?
A. Why, I would have to go back further to make myself clear.
Q. Under the headings "Repairs made by", does that indicate the man who made the repairs?
A. Yes, the circle indicates that the repairs were made.
Q. And the name under the heading——
A. In that column is the name of the man who made the repairs, or who had charge of them.
Q. Or who knew that the repairs were made?
A. Yes, sir.
311 Mr. Ward: Or who was supposed to make them? Which is it?

A. Who made them.
Q. That is written in after the repairs are made?
A. Yes, sir.
Q. Now, the first report introduced in evidence, dated October 1st, by engineer Fox, was made at Dewitt?
A. Yes, sir.
Q. And where is Dewitt?
A. Dewitt is a few miles east of Syracuse. It is the terminal of the Western division. It was then.
Q. And the next report was made October 4th at Rochester?
A. Yes, sir.
Q. And the next report, October 5th, was made at East Buffalo?
A. East Buffalo.
Q. That showed that that engine was used on the road, a road engine, wasn't it?
A. The fact that it went into those points would indicate it went on the road.
Q. It was not a switch engine alone, but it was a big type of freight engine?
A. It was our heavy freight engine.
Q. The counsel has read to you the things that were reported by the engineers as being defective. Did those reports indicate that they had all been repaired?
A. Why, I didn't look at each item, Mr. Spratt, separately.
312 Q. I will have you look at them. (Handing paper to witness.)
A. Yes, the reports indicate that all repairs had been made.
Q. How would you classify these repairs that were needed?
A. Why, they were ordinary running or roundhouse repairs.
Q. Such work as is done at the round-house?
A. Yes.
Q. The counse- has called your attention to a rule of the Public Service Commission, and read it in evidence. Did any of those repairs that he spoke of come under that rule of the Public Service Commission that the engines would have to be reported for repairs?
A. No, sir.
Q. Taken out of service for the repairs?
A. No, sir.
Q. The counsel has read here that they are taken out when there is a crack in the shell of the boiler. Will you describe what a crack in the shell of a boiler is?
A. Why a boiler of course is cylindrical, and on the belly of the boiler the sheets are overlapped and riveted together.
Q. Does it mean a crack in the material itself?
A. It means a crack *or* a fissure in the sheet, in the material itself.
Q. Did any of these reports indicate any such condition of this engine?
A. They do not.
Q. Where it says about the leaks in the belly of the boiler,
313 will you describe what that leak would be?
A. I think Fox in his report says, "Caulk leak on the belly of the boiler." It would indicate that where the plates were joined

the material—they use what they call a caulking tool, take the material at the edge of a seam and drive it in, tighten it, stop the leak, which is a common procedure in boiler work.

Q. The boiler is made up of about how many sheets?

A. There are three sections in that portion of the boiler.

Q. About how wide is each section?

A. It would run, I think at that particular point, about 42 inches.

Q. Now, they are fixed sort of oval shape, aren't they, cylindrical shape?

A. Cylindrical shape like a barrel or tank.

Q. When they come to the bottom that is where they overlap, is it?

A. They overlap at the bottom.

Q. Do they overlap one sheet over the other like my hand, as illustrated by my fingers here (illustrating)?

A. In that manner.

Q. Then how are they fastened together?

A. With rivets.

Q. The leak in the belly of the boiler, describe that leak, the nature of it.

A. It would sometimes happen that one of the rivets is loose, or where the lap is made, the material not forced tightly to-
314 gether, and the rivets are caulked, and the leak around the rivets or in the seam itself, and a caulking tool is used, which is something like a blunt edged chisel, and the edge of the plates are tapered down, they are slanted off, and this caulking tool is driven in around the edge to drive the material in, simply to fill up the crack as it were—the seam rather.

Q. Can you tell the jury approximately about how many rivets there are in a boiler, a locomotive boiler?

A. At that particular——

Q. Of that particular type? I mean generally. Have you any idea? It would run up into the thousands, wouldn't it?

A. Approximately a thousand, yes. At least a thousand.

Q. About how many are there around in the belly of the boiler?

A. Well, they would run in the entire circle of the joint just as close as they could put them. The circumference at that point is possibly 14 feet, and they are very close.

Q. Is there a good deal of strain put upon a locomotive boiler and the apparatus connected with it?

A. Yes, they carry, or did carry at that time about 200 pounds of steam pressure working, and the unevenness of the track, and unequal expansion and contraction put much strain on them.

Q. She was a engine that drew heavy loads?

A. That was the heaviest type of freight engine that the company had at that time.

Q. There was a reference made to stay bolts. Where are the stay bolts?

315 A. Those particular bolts are on the left side, to hold the inner and outer sheets of the boiler together. They are bolts screwed into the two sheets, and they are threaded in, and when

they leak around the seam, around the thread, they were hammered over. If the bolts were broken they were removed.

Q. If there was any leak that would leak water or steam?

A. Steam, at that time.

Mr. Ward: I have no objection to Mr. Spratt going into his defense with this witness. I suppose Mr. Carroll wants to get away. I only want it understood so that if there is anything I want to cross examine Mr. Carroll on I can do it.

Mr. Spratt: You have read all these things in evidence. I am locating where they are. He has offered these sheets in evidence.

Mr. Ward: You are having him testify as a expert about these things. I haven't sworn him in that capacity.

Mr. Spratt: I am asking him what they mean, what it means.

The Court: I think it is proper.

Mr. Ward: I don't object at all, only I wanted to reserve my right to cross examine this witness on new matter, that is all. I suggest to Mr. Spratt to use Mr. Carroll as his witness, and get through with him. I won't object to it being out of order.

Q. Where would the steam go to from the stay bolts?

316 A. These particular bolts that he refers to were covered with a jacket of heavy sheet iron, and steam leaking there would condense and run down some place under the cab, underneath.

Q. That is, the belly of the boiler?

A. No, I refer to the stay bolts, which he reports.

Q. Would the steam from that go into the boiler itself, over the fire?

A. Well, it might leak on either end. I imagine that his report would indicate an outside leak. He doesnt specify, though, in his report.

Q. If it was an inside leak it would go into the fire and up the stack?

A. Yes, sir.

Q. There is another item here of crown sheet leaking. Will you explain that, what a crown sheet is?

A. A crown sheet is the roof of the fire box, that portion of the fire box which comes directly over the fire, which is in the inside of the fire box, and any leak there would be discovered by opening the furnace door and looking in.

Q. If any steam escape from that place where would that go?

A. Up the stack if there was any of sufficient volume.

Q. If there was sufficient?

A. Yes, sir.

Q. I notice a repair on there, in the first exhibit, the work done at Dewitt. Would the air pump have anything to do with the escape of steam?

A. No, sir.

317 Q. This same report has "Flues caulked." What are the flues?

A. The flues are the tubes which carry the heat and the gases from the interior of the fire box through to the front and out of the stack. It would be a leak in the interior of the boiler.

Q. If there was any steam there it would escape through the stack?

A. Yes, sir.

Q. And how is that repaired?

A. By expanding or caulking the flues.

Q. Do the flues frequently get out of order? Is that an ordinary thing to happen in an engine?

A. Some of them require attention as a rule at the end of each trip.

Q. About how many flues are there in a boiler?

A. I think that there were in the neighborhood of 444 in that type of engine.

Q. And about how many stay bolts are there?

A. Well, they are four inches apart over the entire surface—all the sheets.

Q. So that if a flue or a stay bolt or a rivet got out of order, repaired at one place, and a report showed that similar repairs were made at another, would that indicate that it was the same nut or the same bolt?

A. No, it might be any one of that entire number. That was the general way or reporting it.

Q. So that if there was a report that there was a leak in the belly, and repaired a couple of times, would it indicate it was the same leak?

A. No, sir.

Q. It might be one of several hundred places?

318 A. Yes, sir.

Q. The first one had steam pipes out of order. Where are those steam pipes?

A. The steam pipes are two cast pipes in the smoke box, which is the front extension of the boiler, and they carry the steam from the throttle down a long pipe called the dry pipe, and then to the cylinders which are in the interior.

Q. So that if there was any escape of steam from them where would it go?

A. At the front end of the boiler, and thence out the stack.

Q. Valves blowing and out of square, will you indicate to the jury what the valves are, and what it means their being out of square?

A. The valves in that type of an engine are that particular part of the machinery which control admission of the steam to the cylinders. They were on the inside of the cylinders and the valves, a leak or a blow would be passage of steam by the rings, the packing rings, and thence up through the stack, and would be detected by the noise or the roar.

Q. And the steam, if any, would escape through the stack?

A. Yes, sir.

Q. It would not escape externally from the valves?

A. Not externally. It couldn't be.

Q. The blower pipes and valves on this were referred to in the miscellaneous reports. What are those?

A. Just how is it reported there, Mr. Spratt?

319 Q. The bell ringer I want. . (Handing report to witness).

A. The bell ringer was a machine operated by air to ring the bell automatically.

Q. No, steam there?

A. No, it is on top of the boiler and operated by air, compressed air.

Q. There was an item of rod bushings. Will you tell me what rod bushings are?

A. The rods referred to there are the rods that connect the driving wheels and the bushings are brass bearings where the rods are connected to the pins.

Q. Those have nothing to do with the escape of steam?

A. No.

Q. In "miscellaneous" Mr. Fox reports that engine didn't steam. What is the meaning of that?

A. The meaning is it is difficulut to generate steam freely and properly, and some examination is made of the interior of the fire box of the front end to learn the cause.

Q. There is an item "repair jacket under boiler," what does that mean? What is a jacket?

A. A jacket is a covering which covers the entire cylindrical part of the boiler at that point, and it is made of sheet iron covering like stove pipe, Russia iron, a thirty-second of an inch in diameter, and it prevents radiation, and it is also ornamental in fashion.

Q. That hasn't anything to do with holding the steam in?

A. No, it is a covering of the boiler on the outside.

320 Q. I believe that is all the report of engineer Fox. Now, take the report of engineer Ames. He reports crown sheet leaking.

A. That is a leak in the interior of the fire box, the roof of the fire box.

Q. So if there was any steam came from that where would it go?

A. Well, usually it is not of sufficient volume for the dripping of water. If there was sufficient volume it would fall onto the fire. There is no external leak.

Q. Now, there is the flues leaking and flues stopped, I think you said——

A. The flues are long tubes about two inches in diameter which carry the heat, the gases from the furnace through the length of the boiler, and heat up the surrounding water. That is the manner in which the steam is generated, and they are set into a sheet, and the edge is rolled and beaded over.

Q. If there was any leak from that——

A. It would be in the interior of the fire box.

Q. And the flues stopped, what would that mean?

A. Soot and deposits from the gases that collect and plug the flues. It would be cleaned out—blown out.

Q. Then there was an item of "stay bolts leaking outside of cab." What does that mean?

A. I think I described that before. They are the stays that hold the two sheets of the boiler together.

Q. Would there be any leak of steam from that?

321 A. Not unless one was broken. It is usually the dripping of water.

Q. That is, the leaking outside means the dripping of water?

A. Yes. That is also covered by a jacket to prevent it from blowing out into the atmosphere.

Q. That is a minor repair, is it?

A. Yes, sir.

Q. Now, another item is "steam pipes leaking, blow", item 29.

A. I think I have covered that. They are two pipes.

Mr. Ward: That is the same as in the previous report. I will stipulate that the same items apply to all of them, if you want me to, Mr. Spratt.

Q. "Cylinder cocks and rigging, R. F." Would that have anything to do with the escape of steam?

A. His report there would indicate there was something defective with the operation of the cylinder cocks, and not any leak of steam.

Q. Rod bushings, you have already described?

A. Yes, they are brass bearings, where the rods are connected to the pins.

Q. It has nothing to do with the escape of steam?

A. No, sir.

Q. "Valves blowing—both valves?"

A. The valves are the apparatus which control the admission of steam to the cylinders from the boiler and throttle, and they are in the interior of the valve chamber, and any blow goes out through the stack to the atmosphere.

322 Q. Under the head of "other defects" engineer Ames reports "caulk leak under belly of boiler. Smoke box door leaks air." Take the first part, "caulk leak under boiler".

A. He refers to that cylinder part of the boiler back of the saddle. It might be a leak from the seam or one of the rivets at that point.

Q. And "smoke box door leaks air." Would that have anything to do with the escape of steam?

A. The smoke box door is the extreme front of the boiler. It is a steel door, and a leak would mean the admission of air.

Q. Under the report dated October 5th of engineer Cook, "crown sheet leaking." You have already described that?

A. Yes, sir.

Q. Would that necessarily be the same place where it was reported before?

A. No, it might be anyone——

Q. Of a hundred places?

A. Several hundred.

Q. And "flues leaking", might that be——

A. Might be any number of 444 flues.

Q. And "flues stopped" you have already described that?

A. That is soot or deposit in the interior of the flue which needed cleaning out.

Q. That happens frequently, does it?

A. Daily.

Q. And injectors, item No. 24. Will you tell me what injectors are?

A. How is it reported there? Does it just simply say the——

—. ——.

Q. The injectors are the instruments which control,
323 through which water is fed into the boiler. They are in the cab. One on the engineer's side and one on the fireman's side.

Q. Item 24, injectors. (Showing to witness.) Is that it?

A. Just injectors. They are the two machines of the apparatus which feed water into the boiler located in the interior of the cab, one on the engineer's side and one on the fireman's side.

Q. Has that anything to do with the escape of steam?

A. It is report would indicate that there was something wrong with the working of it. It would not indicate a leak.

Q. I think that is all of Mr. Cook. Now, article 11 of the Public Service Commission report, which was introduced in evidence, reads "All steam valves, cocks and joints, studs, bolts and seams, shall be kept in such repair that they will not at any time emit steam in front of the engineer so as to obscure his vision." Would any of these defects reported here obscure the vision of the engineer?

Mr. Ward: How does he know?

A. There is nothing to indicate that they would.

Mr. Ward: I ask that that answer be stricken out as not responsive. The reports are in evidence. They speak for themselves.

Mr. Spratt: He is an expert here. I am asking him.

Mr. Ward: A leak in the belly of the boiler might or might not. How does Mr. Carroll know?

324 Mr. Spratt: I am asking him so far as these reports indicate.

The Court: Yes, he may answer.

A. Will you repeat the question, please.

Q. "B, article 11, All steam valves, cocks, and joints, studs, bolts and seams, shall be kept in such repair that they will not any time emit steam in front of the engineer so as to obscure his vision." I ask you if any of these defects that have been called to your attention on these reports, would they emit steam in front of the engineer so as to obstruct his vision?

A. No. A leak in the belly of the boiler if it were a serious one might. There is nothing to indicate there that it does. But in such cases there is usually a report made by the engineer that "steam obscures vision," or "can't see signals".

Q. There was introduced here in evidence a regulation of the Public Service Commission reading as follows: "If a serious leak develops under the lagger"—what is the lagger?

A. It is a lagging. That is a misprint there. A lagging is an asbestos cement or covering which is put over the exterior of the boiler to prevent radiation.

Q. "If a serious leak develops under the lagging, an examination must be made, and the leak located. If the leak is found to be due to a crack in the shell, or to any other defect, which may reduce the safety, the boiler must be taken out of service at once and thoroughly repaired, before it is reported to be in a satisfactory condition." Now, Mr. Carroll, do any of these defects set forth
325 in these three reports show such a condition that the boiler should be taken out of service under this public service rule?

A. No, that rule is to be accepted literally. It says "Serious leak"—I think the language of it is—and there was no serious leak indicated.

Q. What is the meaning if the leak is found to be due to "a crack in the shell, or to any other defect, which may reduce the safety of the boiler"?

A. Well, a leak—there could only be three types of a leak there. It would be a leak where the metal and the seam proper, where it is drawn together, or around one of the rivets, neither of which would be a serious leak, or a crack which would mean a fissure or a fracture of the sheet of the metal.

Q. Is there anything in these reports that have been introduced in evidence showing that there was a crack?

A. No, sir.

Q. Or that there was a serious defect that would reduce the safety of the boiler?

A. No, sir.

Q. You put three classes, my associate didn't hear, and I want to be sure—I think I heard—you said that the first two were what?

A. The sheet is lapped over. There is the overlap in order to complete the circumference, and there might be a leak passing in between the sheets. That is one type of leak.

Q. In the seam?

A. In the seam proper, and the sheets are at that point
326 held together with rivets, which are driven up hot, and caulked, and sometimes the leak occurs around down by the body of the rivets the rivet hole. Neither of those would be a serious leak. The other leak I say might be a fissure or a crack in the metal itself.

Q. Would any of these defects set forth in these reports require the taking of the engine out of service except for temporary repairs in the round-house?

A. No, sir.

Q. Now, these reports are made for the purpose of having the repairs made at the round-house, are they?

A. That is the object of them.

Q. And are those reports there on file so that an engineer who comes to take an engine out has access to them if he wishes?

A. That was the practice, yes.

Q. And was it the rule that an engineer taking the engine out had

a right to see what the engineer who last had the engine, reports in as being defective?

A. I don't know offhand of any written rule, but it was practically the universal practice and custom, and they had that privilege.

Q. So that they could check up to see whether the repairs had been made that the previous engineer thought was necessary?

A. Why, that was one object, and another one was so that if the fellow who came in with the engine had any particular trouble due to bearings heating, or anything which would require cau-
327 tion on his part, needing particular attention.

Mr. Spratt: I think that is all.

Redirect examination.

By Mr. Ward:

Q. The man who brought that engine in just before Mr. Kinney took it out reported that it was leaking steam, so as to obscure signals, didn't he—Mr. Dorgan?

A. I don't know.

Q. Where is his report?

Mr. Spratt: Mr. Dorgan has testified here.

Mr. Ward: Certainly Mr. Dorgan testified here. We never got his report though. I am trying to find out whether Mr. Kinney had any better luck the day after.

Q. Do you know where Mr. Dorgan's report is?

A. I do not. I can only describe the practice.

Q. Do you know whether Mr. Kinney ever saw Mr. Dorgan's report?

A. I do not.

Q. Did you ever see Mr. Dorgan's report?

A. I don't remember now whether I did or not.

Q. Do you know what was done with it after Mr. Dorgan made it, that this engine was leaking steam so as to obscure signals?

A. No, I assume that it was handled as other reports.

Q. Do you know?

A. No, sir.

328 Q. You know it has never been furnished us, don't you, Mr. Carroll?

A. Why, I really don't know. I don't believe it has.

Mr. Ward: You stipulate, don't you, that you never furnished me with that report, Mr. Spratt?

Mr. Spratt: I don't find it here. This is my first appearance in this case.

Q. Do you know where the report of Charley Kinne is, no relation to the plaintiff, another of your engineers made on the 6th of

October, in which he reported that this engine leaked so as to obscure signals? Do you know where that is?

A. I do not.

Q. Was that ever shown to John Kinney or put where he could get it?

A. I am unable to state.

Q. Did you ever see it yourself?

A. I can't say. There were thousands of reports. I can't specifically answer.

Mr. Ward: I suppose you stipulate that is another report that has not been furnished to us, Mr. Spratt?

Mr. Spratt: I don't know anything about it. I find here three reports when I take up this case.

Q. Now, Mr. Carroll, did you have personal knowledge of the fact that Mr. Charles Kinne reported that engine as unfit for service?

A. I did not.

Q. Did you have personal knowledge that Mr. Dorgan reported that engine as unfit for service?

A. I have no personal knowledge.

329 Q. At the time you told Mr. Kinney it was O. K.?

Mr. Spratt: He doesn't say that he did tell him it was O. K.

Mr. Ward: We haven't asked him that. I will withdraw that question.

Q. At the time that Mr. Kinney took it out did you have that knowledge that Mr. Dorgan and Mr. Charles Kinne had both reported that engine as leaking steam so as to obscure signals and unfit for road service? Did you have that knowledge?

A. I have no knowledge of any reports.

Q. Did you have then?

A. No, sir.

Q. It was your business to know about the condition of these engines, wasn't it? Wasn't that what you were there for?

A. I was the supervising officer of the plant, and the department, and the force should have been familiar with it. Personally, I wouldn't know.

Q. If an engine comes in and is reported day after day as leaking steam, and finally on the 6th of October is reported as leaking steam so as to obscure signals, and on the 7th of October is reported as leaking steam so as to obscure signals and be unfit for road service, don't you know that?

Mr. Spratt: That I object to as stating some things that are not proved.

The Court: He is asking him if he would know that if it were made.

330 Q. Wouldn't you know that, Mr. Carroll?

A. Will you repeat the question.

(Last question read.)

Mr. Spratt: I object to it, as leading and suggestive, and cross-examination of his own witness.

The Court: He may answer.

Mr. Spratt: Exception.

A. I would have no personal knowledge of any specific report.

Q. Who would know about it? Who is the fellow that prevents such things and corrects them, if it wouldn't be you?

A. The foreman of any particular department who has charge of each job would take care of it in a routine manner, and it would be taken care of,—it would not be brought to my personal attention.

Q. Of course when a man makes a report like these that we have managed to get here there are things that call for boiler makers and there are things that call for mechanics, now, aren't there?

A. Yes.

Q. Who sees to it that those mechanics and boiler makers get information about what the engineers state ailed this engine?

A. Do you want me to describe in detail our system?

Q. Yes. How did the mechanics and boiler makers find out that they were to do something on this engine, without going too much into it?

331 A. The working reports were placed on file as soon as they were made, and the foreman of each department, or each particular branch came and copied off the work, or had copied for him the work over which he had jurisdiction and that in turn was given to his force.

Q. Who saw that it was done?

A. The foreman of each department.

Q. Who saw that the foremen did their duty?

A. I did.

Q. Get back to the question I asked you, when the same engine is reported day after day as leaking steam, and finally reported twice on the 6th and 7th as leaking steam so as to obscure signals, isn't that a serious enough matter to be brought to you personal attention?

A. That would depend on the nature of the leak, what caused the leak.

Q. Was this brought to your personal attention? Are you able to answer?

A. I have no recollection of it being brought to my personal attention.

Q. That is as strong as you can put it, I suppose, Mr. Carroll?

A. Why, my recollection at the time was absolute and positive that it had not been called to my attention.

Q. Those reports that we have got here do not show that this engine was turned in except at the end of the day's run, does it? These reports don't show that the men stopped their business and turned the engine in, but that they completed their run, and then reported in the usual way, do they not?

332 A. Well, those three reports cover a period, October 1st, 4th and 5th, a period of five days, with three men, which would indicate that the engine had been in some engine-house during that time having work done.

Q. There is nothing about those reports to indicate that the men stopped on their trip on account of these leaks?

A. No, sir.

Q. It would be customary for the men to complete their runs and then make their report on these leaks, would it not?

A. If the engine was in condition to complete the trip that was what they would do.

Q. They are supposed to bring the engine back? Somebody has got to bring the engine back to the round-house, haven't they? Isn't that so?

A. Yes, but there is a special report made there of an engine giving up a train or having trouble on the road. A special note would be made of it.

Q. If they stop, if they gave it up, don't they put a special not on this report?

A. Yes, and they also had an auxiliary report which would cover it.

Q. And there is no such thing on those reports?

A. Nothing to indicate that they had any trouble.

(Recess until two o'clock p. m.)

333 After Recess—Two o'clock p. m.

WILLIAM P. CARROLL, resumed the stand for recross-examination.

By Mr. Spratt:

Q. Mr. Carroll, the question was asked you, as I recall it, whether Mr. Kenney had asked you for another engine. Was there a rule or practice out there with regard to the rights and duties of an engineer when his engine was not right?

Mr. Ward: If there is a rule I think we should have that.

Q. Is there any rule in reference to turning in his engine if he does not find it right, or any practice?

A. Why, I don't recall any written rule, but there was a practice.

Q. What was that practice?

A. Of asking for another engine if there was something about the one assigned to him which did not in his judgment make it proper to leave with it.

Q. Was it the practice for him to demand it? Did he have a right to get another engine?

A. He had that right, yes.

Q. Supposing he did not consider the engine safe for any reason when he was out on the road what right did he have under such a condition?

Mr. Ward: I object to that. This gentleman is not in the engineering department. He is in the repairing department. He
334 does not pretend to be familiar——

The Court: He is general foreman of the round-house.

Mr. Ward: Yes.

Mr. Spratt: Yes, the reason I am asking is that the counsel asked a question if they didn't have to bring the engine back even though there was so much steam the *the* engineer could not see the signals.

Q. The counsel asked you if the engine had to be brought back anyway. Is that the case?

A. Why, if something developed that would make it unsafe to proceed over the road there was other means; for instance, towing it in with another engine, or coupling it in with a train.

Q. Was it the practice that an engineer, if he did not consider his engine safe, or that the condition of the engine was such that he could not see the signals, to put the engine on the side track?

Mr. Ward: I object to that, the witness not being qualified to answer.

The Court: You may conduct a preliminary examination.

By Mr. Ward:

Q. You had nothing to do with the motor department, had you?

A. I was in the motive power department.

Q. I mean the operating department. You had nothing to do with that?

A. No, I had no connection with the operating department.

335 Q. You never did have?

A. Not directly.

Q. You kept the engines in order?

A. Yes, sir.

Q. Ran the round-house?

A. Yes. I was familiar with the operating rules, though.

By Mr. Spratt:

Q. Were you familiar with the operating rules? Were you familiar with how the engines were brought in there?

A. Yes.

Q. And how with reference to the question I have asked you, if they were not fit to operate how were they brought back?

Mr. Ward: I object to any proof of custom in the operating department on the part of this witness on the ground that he is not qualified.

The Court: I am going to allow it. As I understand, you knew the practice in operating?

A. Yes. I may answer that?

Q. Yes.

A. Why, the procedure and custom was when an engine for any reason gave up its train en route—the term used was "Cutting an engine out"—there were points situated along the division where there were other engine houses. For example, on the main line was Rochester, Lyons. And they had relief engines there which could be secured and the other engines left at such points.

336 By Mr. Spratt:

Q. If the engine got in such condition that it was not safe to operate, could it be put on the side track, and then sent for by other engines?

A. Yes, sir.

Q. In answer to counsel's question you said you had out there several different departments under you?

A. Yes.

Q. And will you state what those departments were? You stated some of them.

A. Why, we had a machinist foreman, a boiler maker foreman, an engine dispatcher who looked after the dispatching and handling of crews. We had a wiper foreman, a truck gang foreman whose particular duty was to look after the tank work, and we had what we term an outside foreman who had charge of the handling of engines around the plant and the hostlers. We had possibly half a dozen.

Q. Did you have any man working under you in 1908, any assistant?

A. Yes, I had a number of assistants.

Q. Who was the man next to you?

A. Mr. Ross, James Ross.

Q. Is he the man that these reports would come to, or did he have charge of distributing the work?

A. That was one of his functions.

Q. You had general supervision of the whole round-house?

A. Yes, sir.

Q. And you didn't keep track of every engine that came in, the report of every engine, I assume?

337 A. I did not.

Q. About how many engines a day would come in there?

A. Well, my recollection is approximately one hundred at that time. That is, in the 24 hours.

Mr. Spratt: That is all.

By Mr. Ward:

Q. I want to ask you a few questions with relation to your last testimony given in behalf of the defendant. There are quite a number of engines that come into the engine-house leaking steam, do they not? Of course all my inquiries relate to this time. That is a common defect, for engines to leak steam, isn't it?

A. No, I wouldn't put it—it is not an uncommon.

Q. Do quite a few engines come in leaking steam or reported at least as leaking steam?

A. Well, that is quite a broad way to cover it, Mr. Ward. There are engines coming in which have steam leaks from different parts of the engine.

Q. As a matter of fact, was an engine leaking steam more or less a common occurrence, at that time, in your round-house?

A. It was not an uncommon report.

Q. Can you answer the question as put to you? Was an engine leaking steam a more or less common occurrence?

Mr. Spratt: It seems to me he has answered it.

The Court: Of course, he has answered it in a way, but he is entitled to his own answer if he can get it.

338 A. It was.

Q. Were quite a few of the engines that were brought into the round-house at that time reported as leaking steam?

A. Well, that is ten years back. My recollection is that we had—with all engine houses it was not—it was an ordinary report.

Q. Let me call your attention to your testimony given on the second trial of this case, which occurred within two or three years after the accident, page 29, as follows: (Reading) "Mr. Carroll, for plaintiff, re-direct." Did you testify "As a matter of fact an engine leaking steam is a more or less common occurrence. Quite a few of the engines that are brought into the round house are reported as leaking steam"? Did you swear to that then?

A. Why, if the statement is correct——

Q. Is it your recollection, having been shown this testimony?

Mr. Spratt: Why, he states that now.

Mr. Ward: He is quite able to take care of himself.

Q. Is it your recollection——

Mr. Spratt: I object to him cross-examining him on something that he says, that there is no contradiction.

Q. Is it your recollection that that is correct?

A. Substantially.

The Court: He can show it to him to refresh his recollection. I take it that that is what is being done, the testimony given on a former trial?

Mr. Ward: Yes.

339 Q. Let me ask you this question. You testified, page 30, as follows: "Q. And they are brought in by the enginemen at the termination of their trip. And when the leak of steam develops they are not expected to stop immediately and get off of the engine, or leave an engine on the siding, not bring the engine in, but they are only expected to bring the engine in at the end of their trip and make a report of it, that is right?" What is your answer now?

A. The answer given there.

Q. What is your answer now?

A. Why, my answer is that it would be up to the judgment of the engineer. That is what he is trained and paid for, and qualified.

Q. What did you answer when that question was asked you before?

A. No.

Q. Do you want to change that answer?

A. Well, the answer is substantially the same.
Q. You don't want to change it then?
A. Well, I was not evidently there allowed to explain just what I had in mind.
Q. Do you want to change that answer "no" that you gave then?
A. No.
Q. You are satisfied with that answer?
A. Yes.
Q. Now I will read you that question and answer again——

Mr. Spratt: I object to it. He has read it to him once and he has answered it.

340 The Court: He says he doesn't want to change it, so that he makes the same answer now?

Mr. Ward: Yes.
Mr. Spratt: I object to it. He says he wants to read it again.
Mr. Ward: I think that is within reasonable bounds of cross examination so that the point will be plain. I don't think you should object to it.
Mr. Spratt: I do object to it. It has been read and answered.
The Court: He may read it.

Q. This is the question: "Q. And they are brought in by the enginemen at the termination of their trip. And when the leak of steam develops they are not expected to stop immediately and get off the engine, or leave an engine on the siding, not bring the engine in, but they are only expected to bring the engine in at the end of their trip and make a report of it, that is right? A. No, sir. Q. Can you recall a single instance during the month when this engine was being reported almost daily as leaking steam, can you recall a single other instance when any other engineer brought it in before his work expired? A. I do not remember any engineer bringing the engine in."

Mr. Spratt: I object to it. That is no part of the cross-examination.
The Witness: I think the balance of that answer will throw a little further light on it.

341 Q. Yes. Do you agree as far as I read here?

Mr. Spratt: Why don't you read the whole answer?
Mr. Ward: I am giving Mr. Carroll an opportunity to be of all the service to you he can.
Mr. Spratt: No, you are not. Read the whole answer.

Q. What would you answer to that question if I didn't read you any part of the answer?

Mr. Spratt: I object and ask that the whole answer be read.

Q. If I just asked you the question as I asked you years ago, "Can you recall a single instance during the month when this engine was being reported almost daily as leaking steam, can you recall a

single other instance when any other engineer brought it in before his work expired," can you answer that question yes or no?

A. Well, depending on my memory I couldn't answer, no, sir. That is too difficult.

Mr. Spratt: I am going read your answer.

Mr. Ward: How is that competent?

Mr. Spratt: You refuse to. Now, let us have the jury have this.

By Mr. Spratt:

Q. Counsel asked you, "can you recall a single instance during the month when this engine was being reported almost daily as leaking steam, can you recall a single other instance when any other engineer brought it in before his work expired"?

342 A. I do not remember any engineer bringing the engine in. I have no correctional authority over these engineers and cannot suspend them in case they violate the rules of the company. When violations of the rules and instructions come to my attention, I report them, if necessary, to the Master Mechanic.

Q. "If the leakage was such as to obscure their view, or make it unsafe they would stop. What we term cutting the engine out." That part the counsel did not read to you, that is your complete answer to that question, isn't it?

A. Yes, sir.

Q. And that was in answer to Mr. Ward's questions in the previous trial, wasn't it—in this trial?

A. I believe so.

Q. And you were a witness for Mr. Ward? In all the trials he has put you on the stand, hasn't he?

A. Yes, sir.

Mr. Spratt: That is all.

By Mr. Ward:

Q. Having had your recollection refreshed by the counsel can you remember that anybody ever brought this engine in?

A. That particular engine?

Q. Yes.

A. I cannot.

Q. Can you remember the reports that Mr. Kinne or Mr. Dorgan——

Mr. Spratt: I object to that. He has already gone over that before.

Mr. Ward: His recollection has been refreshed now.

343 Mr. Spratt: I asked him just a question that you wouldn't read, and you wanted to convey a false impression to the jury. That is the reason I read it. Let us have a square deal on this.

Mr. Ward: Yes, you are a pretty good man to talk about it.

The Court: Will you read the question please?

Mr. Spratt: Exception.

Q. Can you now remember the reports that Mr. Kinne or Mr. Dorgan made about that engine?
A. I cannot remember the reports.
Q. Do you know what became of those reports?
A. No, sir.

By Mr. Spratt:

Q. Your answer there was in reference to the general rule and general practice of cutting out an engine, wasn't it?
A. Yes, sir.
Q. Not of this particular engine?
A. No.

Mr. Spratt: That is all.

CHARLES W. KINNE was duly sworn as a witness in behalf of the plaintiff.

Direct examination.

By Mr. Ward:

Q. You are a New York Central engineer, are you?
344 A. Yes, sir.
Q. And you are now working for them?
A. Yes, sir.
Q. And you have been produced here by the railroad company at my request?
A. I believe so.
Q. That is, you got orders from you- superiors to report here?
A. Yes, sir.
Q. Are you any relation to the plaintiff?
A. No, sir.
Q. You spell your name differently?
A. Yes, sir.
Q. Did you know him when he was in service?
A. Yes, sir.
Q. How long have you been an engineer?
A. A little over fifteen years.
Q. Did you have this engine 2499 before Mr. Kinney's accident?
A. Yes, sir.
Q. Do you remember what day it was?
A. No, three or four days before the accident it was.
Q. And you heard about the accident, did you, afterwards?
A. The night of the accident when I got home I heard about it.
Q. So that the circumstances of your having the engine were fixed in your recollection for that reason?
A. Yes, sir.
Q. And you have been sworn on the various trials of this case on this same subject?
A. Yes, sir.

345 Q. Where did you get that engine from?

A. Well, I don't just recollect whether it was at the old house or at the West Shore house now—either one of those houses. There is two houses where we could get this engine from wherever it was left by the man that came in ahead of me.

Q. Do you recall seeing any previous report on this engine before you took it out?

A. No, I do not.

Q. At the time you took the engine out did you know it leaked steam?

A. No, sir.

Q. What experience did you have with this engine in this respect at the time you took it out, in respect to leaking steam?

A. I had trouble with the engine.

Q. What was it?

A. Why, the steam leaking obscured my view.

Q. How soon did that start after you took the engine out?

A. Why, it developed after I coupled on my train and started with my train for Black Rock.

Q. And what did you do?

A. I took my train from East Buffalo to Black Rock and brought a train back, and on my arrival back, I reported to the yardmaster, what is called the main track shanty, and told him if he wanted me to do any more work I would have to have another engine.

Q. What did you tell him ailed your engine?

A. I told him she was leaking steam so that I couldn't see around her.

Q. Where was the steam coming from then?

346 A. It came from the seam in the shell of the boiler or belly of the boiler—some calls it, and the metallic packing in the left piston.

Q. And did it interfere with your view of signals?

A. It did, yes, sir.

Q. After you discovered the engine in that condition, you took your train to Black Rock and then brought another train back?

A. Yes, sir, after starting off when I discovered it. You wouldn't discover it much until you were started with your engine.

Q. You finished your trip and brought another train back?

A. Yes, sir.

Q. Then you reported it to the round house?

A. No, to the yardmaster.

Q. Who was that?

A. Mr. Lambert I believe at that time had charge of the main track.

Q. Then what did you do with the engine?

A. Why, I made another trip with her.

Q. After you reported it?

A. Yes, sir.

Q. Who told you to do that?

A. Why, nobody told me to do it. I done it of my own accord.

Q. Did anybody request you to do it?

A. No, sir.
Q. Where did you get orders for that other trip?
A. Why, the yardmaster asked me if I would go to Black Rock light and then back up from Black Rock to East Buffalo,
347 that my day's work would be done.
Q. Using the same engine?
A. Using the same engine.
Q. And did you do that?
A. I did.
Q. It still continued to leak steam?
A. Yes, sir.
Q. In backing up it didn't interfere with your view of signals, I suppose?
A. No, sir.
Q. Can you remember whether you made a report of that when you brought your engine in at night?
A. Yes, sir.
Q. One of these written reports?
A. Filled out one of their regular forms.
Q. And did you turn that into Mr. Carroll's office in the usual way?
A. Not into his office; into what would be called the clerk's office, where it was handled.
Q. That is one of the departments?
A. Yes, one of the departments.
Q. Did you ever see it since?
A. No, sir.

Q. Can you remember any more clearly than you have told us the language of the report that you made to the engine house about this engine?
A. Why, I wrote down at the bottom of the report that the engine was not in fit condition—I wrote at the bottom of the work report that the engine was not in fit condition for road service.
Q. Did you give any reason?
348 A. On account of leaking steam.
Q. And that you say was two or three days before Mr. Kinney's accident?
A. Three or four days before the accident.
Q. Now, Mr. Kinne, you are an experienced engineer. I would like to ask you a few questions about this operation. You are familiar with that rule 102, are you, about putting a man in a conspicuous position at the head of a leading car?
A. Yes, sir.
Q. You are familiar with this way the rule is given in the book—the way the signals were given in the book and the way the signals were given in practice?
A. Yes, sir.
Q. Now, here is a lantern (indicating). Will you show the jury how the proceed signal was given in the book?
A. (Witness indicates).

Mr. Ward: Mr. Kinne moves the lantern up and down in a vertical position, the lamp remaining in an upright position.
Mr. Spratt: About 18 inches.

A. Well, of course some people maybe would give it higher than others.
Mr. Spratt: From the knee up to the shoulder.
A. Yes, just about like that (indicating).
Q. How is it given in practice?

Mr. Spratt: I object to it as incompetent and improper.
The Court: Objection overruled.
Mr. Spratt: Exception.

A. (Witness indicates).

349 Mr. Ward: Witness holds the lantern by the handle, swinging it out from the knee up even with the shoulder and back. Is that correct?
Mr. Spratt: Yes.
Mr. Ward: In the arc of a circle.

Q. Now, Mr. Kinne, did you know that territory out there where this accident happened?
A. Yes.
Q. Were you acquainted with that dwarf six as it was located at the time?
A. Yes, sir.
Q. In making that movement around the Y and in all movements at that point were those movements controlled by the towers and signals?
A. Yes, sir.
Q. If there was a train for instance that had a time table and the train was scheduled to run on the time table did that have anything to do with those movements there provided the tower signals were set for other movements?
A. If you receive the signal you proceed regardless of whether there is another train due there or not.
Q. Supposing a man had a green light as he approached No. 6, what does that mean?
A. That he has a right to proceed.
Q. Up to what point? Proceed to what point, Mr. Kinne?
A. Just what we would call west or north of the home signal on the eastbound track or southbound track.
Q. That would be to a point where he would become foul of the main track?
350 A. He would be over on the main track.
Q. In railroad operation if you are giving a signal once, can a contrary movement—conflicting movement—that is the word I want to use—can any conflicting movement be permitted until you come to a stop?
A. No, there can not be any conflicting movement made until

the towerman knows that the train that first had the signal had come to a stop.

Q. I suppose you have pushed cars a great deal, haven't you?

A. Yes, sir.

Q. You have been a freight conductor in times past?

A. No, sir.

Q. Were you always a passenger conductor?

A. I am an engineer.

Q. I mean an engineer.

A. I have been a freight engineer.

Q. Are you a freight engineer now?

A. Yes, sir.

Q. So that you have pushed a great many cars?

A. Yes, sir.

Q. You are familiar with that rule in reference to putting a man in a conspicuous position on the head car?

A. Yes, sir.

Q. If an engineer is pushing a car, and for any reason can not see the signal, does he operate the car in accordance with the signals of the head end man, provided he knows the man to be reliable?

A. Yes, you operate your engine according to his signal.

Mr. Ward: You may ask.

351 Cross-examination.

By Mr. Spratt:

Q. I assume that before obeying the signals you would want to know that he was reliable, would you not, Mr. Kinne?

A. If you have worked with a man—you wouldn't have to work with him very many minutes before you would know whether you could rely on his signals or not.

Q. The counsel has asked you about signals where there were many cars attached. Now, when there was merely a caboose being pushed along by the engine one man could give the signals, could he not?

A. One man could give the signal to the engineer, yes, sir.

Q. And so that if he was standing on the front end of the caboose, the direction in which the car was going, and on the right-hand side, being on the same side as the engineer, the come ahead signal would be the same as you have given it here—the slow come ahead signal, would that be the same as you have given it here?

A. Why, practically the same, yes.

Q. Just show it to the jury. Take the lantern and show the jury what a slow come ahead signal would be.

A. Slow signal meaning where you were coupling cars would come different than that signal.

Q. Under these conditions?

A. It would be like that (indicating). That is a slow come ahead signal.

Mr. Spratt: The witness holds the lamp out about arm's
352 length, and about even with his chest, and gives a movement of about—the lamp would move about 18 inches, wouldn't it, your Honor, there?

The Court: I think so.

Mr. Spratt: And abotu three feet away from his body.

Mr. Ward: A circular movement, isn't it, Mr. Spratt? That is correct, isn't it, Mr. Spratt?

Mr. Spratt: No.

Mr. Ward: I think it is a circular movement, and I would like to put my view of it on the record, and leave it to the jury.

Q. It is principally a wrist movement?

A. Yes, there is a little movement of the arm—mostly wrist.

Q. Assuming that the bench there where his Honor sits is the back end of the caboose, and he had his back up against that, how would you give a stop signal?

A. If I wanted that man to stop?

Q. Yes.

A. (Witness indicates.) That signal.

Mr. Ward: Please describe that.

Mr. Spratt: That is a signal——

Q. It is horizontal, isn't it?

A. It is horizontal.

Mr. Ward: Arm held at arm's length, lantern swung by the wrist in a direct swing away from and toward the body in a horizontal manner over a space of about 18 inches.

Mr. Spratt: Yes.

353 Mr. Ward: The lantern being in sight all the time.

Mr. Spratt: Yes.

Juror No. 2: That is part of the stop signal?

A. That would be a signal used where a man couldn't see you, or we will say you were in between two strings of cars, and you hadn't room to give the regular stop signal, you could use that signal to stop a man who was coupling cars or anything.

Q. I say, when he is on the end of a car, you know what the rule book says, don't you, Mr. Kinne?

A. Yes, sir.

Q. That (indicating) is the horizontal signal, isn't it?

A. Yes, sir.

Q. Will you give that signal to the jury? Show how you would give the stop signal as required by the rules of the company.

A. (Witness indicates.) That is facing the engineer.

Q. No, a man standing with his back——

A. You would only get part of that signal. When I went past my body he wouldn't get it. You are supposed to face the engineer.

Q. But he would see the light, wouldn't he, appearing and disappearing?

A. Yes, sir.

Q. If this was the back of the caboose right here, and you were right on the back of it, right near the edge, now give the
354 signal that is required by the rules of the company, the stop signal?

A. (Witness indicates.) That is the rule. That is the signal given by the rules.

Q. You have described a signal across your body in a horizontal manner and about even with your stomach?

A. Well, of course my hand would come there. That would depend on the man's arm.

Mr. Ward: And the lantern swinging to the height of his shoulder?

A. Yes, sir.

Q. Now, Mr. Kinne, it is the rule, isn't it, to report on engines when you bring them in as to their condition?

A. Yes, sir.

Q. And you hardly ever make a run with an engine but what something is needed to be repaired when you bring it in?

A. No, you can always find something for them to do.

Q. Is there a good deal of strain put on the boiler?

A. Yes, a locomotive boiler has the worst strain of any boiler that is built.

Q. Are leakages of steam a frequent cause of complaint in boilers?

A. Yes, sir.

Q. There are a great many rivets in the boilers?

A. Yes, sir.

Q. And seams?

A. Yes, sir.

355 Q. And stay bolts?

A. Yes, sir.

Q. So that while you might bring an engine in and have one stay bolt or one seam or one rivet repaired, the next day you might have a leak somewhere else, some other rivet, some other seam?

A. Yes, sir.

Q. So that that is nothing unusual at all to find an engine that leaks a steam? Now, the piston packing frequently leaks steam, doesn't it?

A. Oh, sometimes they will go quite awhile before they leak, and then again it will break right out, maybe the first trip after they are renewed.

Q. The babbitt metal, the packing is a sort of a babbitt metal?

A. Soft metal, yes.

Q. First when it is put in it frequently leaks steam?

A. Yes, sir, until it fits itself down to the rod it does, some.

Q. Until with the heat it sort of forms itself to the piston rod?

A. Being a soft metal it will wear down and conform itself to the shape of the rod.

Q. So that after packing has had a little wear it is better than it is when it is new, isn't it, so far as keeping the steam in?

A. Yes, sir.

Q. There is also oiling, putting oil in the oil cups?

A. It receives oil through the oil cups, and also as the
356 piston passes into the inside of the cylinder it receives a lubricant from the lubricator that is oiling the walls of the cylinders.

Q. If you permit that to go dry, the packing to be dry, the steam will escape?

A. It has a tendency to ruin the packing.

Q. Causing it to wear and leave a space for the steam to get out?

A. Yes, sir.

Q. Now, you said when you had this engine out that it did leak steam, and you returned that to the yard master?

A. Yes, sir.

Q. Mr. Kinne, the yard master hasn't charge over engines, has he?

A. Yes, sir, while you are in his territory.

Q. Only in the movement, not in the repair?

A. Oh, no, nothing to do with the repairs.

Q. Did you have a right under the practices that prevailed there to turn that engine in if you didn't consider it in proper shape?

A. Yes, sir.

Q. And you could on this occasion have gone right to the round house with it and demanded another engine?

A. Yes, sir.

Q. But you determined—you used your own——

A. The offer that he made me. Going light I wouldn't—no steam would arise because I wouldn't be working the engine strong enough, and backing up with the train the steam would be all back of me.

Q. So that there was no danger?

A. No, there was no danger in my making that trip. I didn't consider it was.

357 Q. What was the rule and practice with reference to, for instance, your being out on the road or out somewhere where you considered the engine unsafe to proceed further?

A. Why, you take your train and put it in on the first siding and notify the superintendent, and he will give you orders whether to bring your engine in light or wait until they send another engine to you, and if they sent another engine to you you take that engine, and the man that brought the other engine he takes your cripple back.

Q. So that it is entirely in the option of the engineer whether it is safe for him to proceed or not with the engine?

A. Yes, sir.

Q. He has a right to lay it up anywhere?

A. Yes. Of course he wants to get his train clear of the main track. It is not policy to block the main track.

Q. Have you had any experience of that kind yourself, Mr. Kinne?

A. Yes, sir. I have left trains on siding and taken my engine in.

Q. Now, Mr. Kinne, when you reported the engine in some three or four days before this accident happened, you reported it in as leaking steam?

A. From the left piston and the seam in the shell of the boiler.
Q. Would you call those minor repairs?
A. Why, yes, it wouldn't take long to repair them.
Q. Were those such as could be done and were done in the round-house?
368 A. Yes, sir.
Q. Now, you know where this dwarf six is?
A. I did at that time, yes. I haven't been over there now in two or three years.
Q. You did know where it was at that time?
A. I did at the time of the accident, yes, sir.
Q. If you came along there and the light was purple what was your duty?
A. To stop.
Q. If you came along there, knowing where the signal was, and didn't see it, what was your duty?

Mr. Ward: I object to that. That is a hypothetical question, which does not contain all the facts. Mr. Spratt is asking Mr. Kinne a hypothetical question as an expert. I have no objection to his answering a question which contains a statement of the facts now in evidence, that is, that the engineer had seen the signal green, and that he was operating from the signals of a man on the leading car. If the hypothetical question includes those facts I have no objection to it. If it does not include those facts, it is not a proper question.
Mr. Spratt: I am just asking him to interpret a rule.

(Question read).

A. To stop.

Redirect examination.

By Mr. Ward:

Q. I will ask Mr. Kinne the full question. Mr. Kinne, supposing you came along there pushing a car, and had an engine, and you approached Hertel Avenue, and you observed this dwarf No. 6
359 was green, and you had a man on the leading car, and he continued to give you proceed signals, and you couldn't see the dwarf thereafter by reason of an escape of steam, what would you do?
A. If I saw the signal once around about Hertel Avenue, and I still received a proceed signal from the man on the leading car?
Q. Yes, sir.
A. I would proceed.
Q. Now, I wanted to ask you about that signal that Brother Spratt has given. This is the caboose, we will say (indicating). Brother Spratt asked you to give a stop signal according to the rules in the book?
A. Yes, sir.
Q. Just do that again for me.
A. (Witness swings lantern.)

Q. What sort of a signal would be conspicuous if there was a caboose here (indicating), and his Honor was sitting where the engineer sits, and the caboose between you and his Honor, what kind of a signal would the engineer see if you were making that kind of a signal?

Mr. Spratt: I think that is for the jury. They can see it.

The Court: He is an expert engineer, and he is being asked what he would see in his experience.

Q. What would the engineer back of you see?

A. He would get a come ahead signal.

Recross-examination.

By Mr. Spratt:

Q. Get a come-ahead signal instead of a stop signal?

360 A. Yes, because he would not see the whole of the signal.

Q. In case you don't see the whole of the signal, what is the duty of the engineer under such circumstances?

A. Why, if he does not get the complete signal, he would stop.

Q. That would be his duty, would it not?

A. Yes, sir.

Q. The engineer going along there, as Mr. Ward has described, and if the signal was purple against him, and if he was in doubt as to the kind of signal that was given him by the brakeman, what would — his duty under such circumstances?

A. It would be his duty to stop.

Mr. Ward: We concede that.

Q. If the signal under those conditions was purple, and the brakeman was giving him a come-ahead signal, would there be a conflict of signals under such a situation?

A. If he could see that dwarf, no matter what the brakeman was giving him, he was supposed to stop.

Q. Supposed to stop?

A. Yes, sir, if the dwarf was against him, signal against him.

Q. Supposing he saw or could see both? There would be doubt then—conflict?

A. Why, no, the dwarf signal would be superior to the brakeman's signal.

Q. It would?

A. Sure.

Mr. Flynn: Now, I will read the testimony of Mr. John J. Dorgan.

361 (Mr. Flynn read as follows, appearing at page 117 of the appeal book on the third trial:

"JOHN J. DORGAN, sworn for the plaintiff, testified as follows:

Direct examination.

By Mr. Ward:

I am a New York Central locomotive engineer and have been employed as such upwards of eight years. I had engine No. 2499 some time before Mr. Kinney's accident. I heard about the accident. I had this engine from East Buffalo. I couldn't tell you which round house. I used the engine for about a day's work. It was on the Falls Branch, possibly between here and Tonawanda and Niagara Falls. I had no serious trouble with that engine about the steam, leaking steam. I could not say that I made a report of that engine that night. I don't remember.

Q. Did you have some trouble with the engine about the steam?

A. The trouble—I remember having—that is, at times that the steam would obstruct my view. I don't remember the parts that steam came from. It was customary at that time if an engine leaked steam so that it obstructed the engineer's view, to make a report of it. I can't remember making out a working report when I got in. It was my usual practice and custom to do so, and I did that generally. I have no recollection that I departed from that
362 custom that night. The most I remember of that engine bothering me was on the West Shore Junction when I come—that is, put the engine on the pit, after I had finished. The tracks are curved there. At that time the steam obstructed my vision. I couldn't say that I made a report of that. It is customary, that is all. I don't recollect anything about it. I rather think it was towards morning that I arrived at East Buffalo and turned that engine in; on the morning of the day that Kinney got hurt. She was leaking steam when I turned her in. I do not remember how long after I had it out it was before it started to leak. I don't remember just when that engine started to leak. She was not leaking that bad when I took her out, I don't think; sometime after I got started.

Q. Did you turn her in at any time on account of this leaking steam, or did you turn her in when your day's work was done?

A. I turned her in when our day's work was done. I have made movements around this Y here at Black Rock, where Kinney got hurt, and similar movements around the City of Buffalo.

Q. What was the custom and practice of the company when you are pushing cars as to the location of a brakeman at the head end?

A. It depends upon the condition of the work. If it is in the yard service, where they switch cars, they don't have a man on the head end as a rule switching cars.

In a movement from the military road down across Hertel Avenue and onto the main line tracks, under these circumstances, I
363 would have a man on the head end. When I have a man on the head end, and for any reason I am unable myself to observe the block signals, I operate the car—the engine, in accord-

ance with his hand signals. That is the custom and practice of the company. And he is supposed to give hand signals to indicate whether I should stop or proceed, and I operate in accordance with those.

Q. In the escape of that steam as you observed it from that engine on that day before Mr. Kinney got hurt, did that bother you any in seeing signals?

A. I can't remember that it did. Up there, I arrived at the West Shore on completing my trip. That is the most recollection I had on it.

I remember being a witness on the last trial.

Q. Do you remember testifying on the last trial——

Mr. Rourke: What page?

Mr. Ward: Well, it is in the printed record.

Mr. Rourke: I have a printed record here, too.

Mr. Ward: Page 213.

Q. Do you remember testifying on the last trial, in answer to the question, 'How long did you operate the engine that day? A. I could not tell you the number of hours, but steam bothered me during the day or night, I guess it was partly night.' Then you were asked 'To what extent?' and did you say 'It made it very hard to see signals ahead with that steam leaking'?

Mr. Rourke: Are you reading from the minutes now?

364 Mr. Ward: Yes, sir, page 113.

Mr. Rourke: Yes.

Q. Is that correct, Mr. Dorgan?

A. Yes, sir, I suppose it is.

Q. And now that I have refreshed your recollection as to your testimony on the previous trial, would you say that you did have some difficulty in seeing signals on account of leaking steam?

A. Why, I admitted that just now. I am acquainted with this neighborhood where the accident happened. And train movements at that point—at the time of the accident; were governed by a block signal indication entirely.

Q. So that is a man proceeding against the current of traffic there on that Y, got the green signal, he had a right to proceed on the tracks?

Mr. Rourke: I object to that as a conclusion of this witness, incompetent, immaterial and irrelevant.

Mr. Ward: Got a green dwarf I do not know how else it can be established.

The Court: I sustain the objection.

Q. Was there any written rule on that subject, Mr. Dorgan?

A. Not that I know of.

Q. What was the practice and custom of the company in operating trains there against the current of traffic, when a green signal was displayed on the dwarf?

A. Well, a green light on that dwarf at night is permission to proceed.

Q. So that whether there was a train due on the main track
365 or not, if there was nothing displayed to you, if you got the block signal indication, you were at liberty to proceed, were you not?

Mr. Rourke: I object to that as calling for a conclusion of the witness.

The Court: I think that is as far as you can go, Mr. Ward.")

Mr. Spratt: I object to that, as calling for the conclusion of the witness.

The Court: He may answer.

Mr. Spratt: I take exception.

("A. A green light meant to proceed to the next signal, wherever that might be, from one signal to another. There is no other signal from the dwarf to the main track. And a green light at that point indicates that you may proceed onto the main track.

Q. Does an engineer operating at that point under block signal indications, does he have anything to do with times tables on the main track?")

Mr. Spratt: I object to that, as calling for a conclusion, incompetent, immaterial, irrelevant, not referring to the facts and circumstances surrounding this particular occasion.

The Court: Objection overruled.

Mr. Spratt: Exception.

("A. Why, the question is not just right, I believe, regarding this, that an engineman moving there at that point, he may be a man that has got to be familiar with the time cards, due to having to run over those main tracks other than that Y, or in fact all the track around this vicinity, you have got to be familiar with the time tables.

366 If a man gets a signal at that point to proceed even if it is on the time of a regular train, he has a right to proceed.")

(Mr. Spratt reads cross-examination, as follows:

"Cross-examination.

By Mr. Rourke:

Q. And it is the rule that he shall not unnecessarily delay first-class trains?

A. No, sir. (So printed. I. F. C. Sten.)

Q. And freight trains are generally at those points held subordinate to the first-class trains?

A. Yes, sir.

Q. As a rule at those points you cannot get a signal to proceed for a freight train if a first-class train is due?

A. No, sir, you are generally held.

The place where you look for this signal as a rule, is at the signal itself. You are required to observe the signal until the time you come to pass it. Purple on a dwarf signal indicates a stop. And you may proceed up to the dwarf or up to the light, but then it requires you to stop. On the inside of that curve, passing from tower 'I' down to tower 55, with a caboose ahead of you, there is not much difficulty of an engineer seeing ahead of that caboose if he is on the inside and puts his head out of the cab window.

Mr. Ward: We won't dispute that, Mr. Rourke. If there had not been any steam there, we could have seen all right.

It is very common to be troubled with steam during the course of a day's work. When I take one out in the morning, it is
367 all right, but it begins to show wear in the day; have breakdowns. It is very frequent for the piston to begin to blow steam. As a matter of fact it is a very common occurrence. I recall no serious trouble. My recollection is it was after my day's work was done that I noticed the steam particularly. It was at the finish of the day. That was the time I was turning her in at the West Shore house, putting her on the pit, at the West Shore Junction, as we came towards the roundhouse. That is near this West Shore roundhouse in East Buffalo. And if we have any serious breakdown or an serious trouble with our engine we are in perfect permission to sidetrack her at any point we may be, and call for another engine. That is true. That is one of the rules of our department. It is up to us. As a matter of fact we are required to do it and not to take any chances.")

(Mr. Flynn reads re-direct examination as follows:

"Redirect examination.

By Mr. Ward:

I ran this engine right along until the day's work was done. Then, when I turned it in, I turned it in to the West Shore roundhouse.")

Mr. Ward: Will you read the balance?

(Mr. Hollister reads as follows:

"By Mr. Rourke:

My time would have gone on just the same if I had had to put the engine on a side track and 497 waited for another one.")

368 JAMES A. ROSS was duly sworn as a witness in behalf of the plaintiff.

Direct examination.

By Mr. Ward:

Q. Mr. Ross, what is your business?
A. I am working for the Bureau of Construction and Repair, United States Navy.
Q. Do you live here in Buffalo?
A. At the Curtiss Aeroplane.
Q. In 1908 were you connected with Mr. Carroll in the New York Central service?
A. I was foreman machinist under Mr. Carroll.
Q. What were your duties?
A. To look over the work reports, and sort the work out that particularly came under my supervision.
Q. You have been sworn as a witness on every trial of this action?
A. Yes, sir.
Q. Have you any recollection of seeing any of the work reports on this engine 2499 before Mr. Kinney's accident?
A. None before the accident excepting—I have knowledge of work being done on that engine before the accident, yes.
Q. You have knowledge of work being done on it?
A. Yes, sir.
Q. Do you remember seeing any of the reports from any of the engineers that used it before the accident?
369 A. No, sir.
Q. Were you there the day that Kinney took the engine out?
A. Yes, sir.
Q. Do you remember seeing Dorgan's report there that day, the man whose tesimony we just read here?
A. No, sir.
Q. Do you know where that report is or where it went to?
A. No, I don't.
Q. Did you ever see Charlie Kinne's report, the man who said the engine was unfit for road service?
A. No, sir.
Q. Don't know where that report went to?
A. No, sir.
Q. How was you- attention first called to that engine?
A. A piston rod packing was reported leaking on the left side, and I sent a couple of men out to do the work.
Q. What kind of an engine was that?
A. It was a heavy type of freight engine; type G-5, I think.
Q. What was that engine ordinarily used for when it was in good condition?
A. Main line freight service.

Mr. Spratt: I object to the form of the question, incompetent and immaterial.

The Court: You were familiar with the use of this particular engine, were you?

The Witness: He said when it was in good condition.

370 Mr. Spratt: That is intimating that it was not in good condition.

Q. We will leave out—what was it ordinarily used for, not at this time, but what was it designed for?

A. For heavy freight work.

Q. Yard work or main line work?

A. Main line work.

Q. What was it being used for at the time of this accident?

A. For short runs around Buffalo, between here and Black Rock.

Q. Why was that?

A. It was not fit for main line service.

Q. Who determined that?

Mr. Spratt: I object to it.

The Court: Objection overruled.

Mr. Spratt: Exception.

A. That is determined by the reports which cover the condition of the engine.

Q. Do you know how long it had been used for short runs?

A. No, sir.

Q. Now, this engine came to your attention on the morning of Mr. Kinney's accident, did it?

A. Yes, sir.

Q. What did you find out about it that morning?

A. All the work that came under my—that was up to me was to have the piston rod packed on the left side, and I sent two men out to do it.

Q. What is the piston rod packing for?

A. To prevent steam from getting into the atmosphere from the cylinder.

371 Q. If a piston rod is cut what effect does that have on the packing?

Mr. Spratt: I object to it, as incompetent, immaterial and irrelevant.

The Court: Overruled.

Mr. Spratt: Exception.

A. It will tear the packing.

Q. That results in what after the engine is run awhile?

A. It is necessary to renew the packing.

Q. What trouble, if any, does it cause to have the packing torn?

A. Steam will leak out around between the packing, and the pistons into the atmosphere.

Q. Was your attention called to the leak in the belly of the boiler?

A. No, sir.
Q. Did you do anything to this engine except to have the piston repacked?
A. That was all.
Q. Who were the men that you ordered to do this work?
A. A mechanist by the name of Schwartz and a helper by the name of Kreiger.
Q. Did you examine the piston yourself?
A. No, sir.
Q. If you have got a cut piston what do you do with it ordinarily?

Mr. Spratt: I object to it, as incompetent, irrelevant and immaterial.
The Court: Same ruling.
Mr. Spratt: Exception.

A. If the piston is badly cut it should be taken out to turn.
372 Q. Does that involve taking the engine out of service?
A. For a length of time.
Q. How long?
A. Oh, that would be four or five hours. Perhaps more.
Q. Did you have this piston taken out?
A. No, sir.
Q. After the men had finished working on the piston did they make a report to you of its condition.
A. Yes, sir.
Q. Did you make a report to your superior, Mr. Carroll, of what the men had said to you?
A. Yes, sir.
Q. What did you say to Mr. Carroll?
A. I told Mr. Carroll——

Mr. Spratt: I object to it, as incompetent, immaterial and hearsay.
The Court: Carroll was his superior? He was foreman?
Mr. Ward: Yes.
The Court: He was the head foreman of the roundhouse. Very well, you may answer.
Mr. Spratt: Exception.

A. I told Mr. Carroll that the men were not satisfied with the work that they had done on it, they had done the best they could, that the piston rod was cut.
Q. What did Mr. Carroll say?
A. He didn't say anything just at that time.
Q. Were you there when Mr. Kinney came to Mr. Car-
373 roll, and asked him if the engine was O. K.?
A. Yes, sir.
Q. What did Mr. Carroll tell him?
A. "O. K., take her."
Q. Was that after you told him that the piston rod was cut and the men were not satisfied with the job?
A. Yes, sir.

Mr. Ward: That is all.

Cross-examination.

By Mr. Spratt:

Q. When did you leave the employ of the New York Central?
A. About eight or nine years ago.
Q. What was the trouble?
A. I was discharged.
Q. So that you are not any too friendly towards the New York Central?
A. I have no feeling against anyone connected with the New York Central, or no other company.
Q. Not the slightest?
A. Not the slightest.
Q. You believe, then, that your discharge was justified?
A. I don't believe it was.
Q. And although you think your discharge was not justified yet you feel perfectly friendly to them?
A. Well——
Q. Just answer my question. Do you?
A. I don't feel unfriendly.
Q. Do you feel friendly? That is what I asked you?
374 A. I have no particular friendship for the New York Central or any other corporation.
Q. You have answered it. You were the man, you say, under Mr. Carroll?
A. Yes, sir.
Q. And you were the man that these reports came to as to the condition of the engines?
A. I got my work off—I took my work from them reports.
Q. And apportioned it among the men, did you?
A. To some of the men.
Q. And on the occasion in question had you apportioned this engine to the men?
A. I gave out the work to two men.
Q. And it was your duty, wasn't it, for you to see that the work was well done before the engines were sent out?
A. Why, under certain conditions.
Q. Wasn't it under all conditions? Wasn't it your duty to see that repairs were properly made, and the engines were in proper shape before they should be sent out on the road?
A. Yes, sir.
Q. You don't pretend to know anything about the condition of the work done on the belly of the boiler, do you?
A. No, sir.
Q. You saw the engine there did you not, before this man took her?
A. Out on the side track next to the dump pit.
Q. Did you see any steam escaping from the belly of the engine when she stood there before this man took her out?

375 A. I have no particular knowledge about that.

Q. If you had seen steam escaping, and you knew that she was ready to be taken out would you say she was in unfit condition to go out?

A. It would depend on how much steam was escaping.

Q. If there was so much steam escaping that it enveloped the engine would you say she was in unfit condition to be put out on the road?

A. That would be beyond me to say. I would have no jurisdiction over that.

Q. You were there to see that repairs were made, were you not? Would you say——

Mr. Ward: Just a moment. I object to the counsel asking a question and then not giving the witness an opportunity to answer.

The Court: He has changed his question, and is asking another one.

Q. Would you say that the repairs were properly made to that engine if she was leaking steam in the belly of the boiler when she was ready to go out, to be taken out?

A. No, they would not be.

Q. If the engineer Dorgan reported her in the night before leaking steam in the belly of the boiler, it was your duty to see that the men under you made the repairs?

A. No, sir, those men that make the repairs on the boiler were not under my jurisdiction.

Q. Haven't you got a responsibility as assistant to the chief man out there to see that the engine is in fit condition to go out?

376 A. That is why I told Mr. Carroll what the condition was.

Q. You are trying to excuse yourself by saying that you passed it onto to Carroll, are you?

A. I did all that I could do under the circumstances.

Q. Did you tell Carroll anything about there being steam leaking from the boiler?

A. No, sir.

Q. Was there any steam, as a matter of fact, leaking from the belly of the boiler?

A. I don't know.

Q. Did you see any?

A. I don't remember.

Q. You saw the engine there?

A. Yes, sir.

Q. Before she went out?

A. Yes, sir.

Q. And it was your duty to see that she was in good condition in going out, wasn't it?

A. As far as part of the work.

Q. Would you not have noticed it, being in the position that you were, and the duties on your shoulders as they were, if she had been leaking steam from the belly of the boiler?

A. It was such a common thing at that time, you know——

Q. I say, wouldn't you have noticed it if she had been leaking steam?

A. Not particularly.

Q. Not particularly?

A. No.

Q. You wouldn't? Do you mean to say you were as care-
377 less about your inspecting your work out there as all that?

A. I was not careless.

Q. You weren't careless?

A. No, sir.

Q. Don't you think it was a careless thing if this engine was leaking steam out of the belly of the boiler to let her go out in that condition, if such was the fact?

A. I have nothing to do with the boiler work.

Q. You had to do with general repairs of the engines, did you not, to see that they were in proper shape?

A. Just for the machinists?

Q. Weren't you under Mr. Carroll?

A. As a foreman machinist; not as a foreman boiler maker.

Q. Weren't you right next to Mr. Carroll?

A. As a foreman machinist.

Q. Weren't you next to him generally under the whole thing?

A. No, sir, he was the general foreman. I was simply a sub-foreman.

Q. The packing was under you then, was it?

A. Yes.

Q. These two men came and reported to you, as you claim, that they were not satisfied with the job that they had done?

A. Yes, sir.

Q. Did you go over and look at the job which they had done?

A. No, sir.

378 Q. Wasn't it your duty to go over and look at the job?

A. That all depends on the man who did the work.

Q. Didn't you consider it your duty when men report- an engine being unsatisfactory, being a machinist's job, you at the head of that department, wasn't it your duty to go over and look at that engine and see whether or not it could not have been made right in that respect?

A. Those men were responsible men, and I took their word for it.

Q. You were above them, weren't you?

A. Yes.

Q. You were supposed to be an abler man from your position, and a more skilled man than they were, weren't you?

A. Yes, sir.

Q. And yet after they told you, as you claim, that they could not make it satisfactory you didn't even have interest enough to go over there and look it over?

A. I had interest enough to report it to my superior.

Q. Now, you say you passed on the word to father? Is that it? You didn't take any responsibility at all? Is that the way you did out there?

A. There was no other course open.

Q. There was a course open for you as a skilled man to go there and look at it, wasn't there?
A. I might have gone out, but I didn't.
Q. Did you ask these men in what respect it was unsatisfactory?
379 A. They told me.
Q. In what respect was it unsatisfactory?
A. The piston rod was cut.
Q. Did you go over and look at it to see how badly it was cut?
A. No, sir.
Q. Did you go out and order a new piston rod to be put in, or that piston rod fixed so that the defects would be eliminated?
A. No, sir.
Q. Who do you say these two men were?
A. Mr. Schwartz and Mr. Krieger.
Q. And you didn't take interest enough in it to see that these changes were made?
A. I believe I had interest in it to report it to Mr. Carroll. That was interest enough.
Q. Did you hear Mr. Carroll at the trials here deny that he ever had any such conversation with you?
A. I don't remember him denying it.

Mr. Ward: He never has denied it.

Q. You remember the men who did these repairs? What are their names?
A. Schwartz and Krieger.
Q. Did you hear them on the stand deny that they ever made any such report to you?
A. I did not.
Q. Were you here? Did you hear them testify that they put that packing in good shape?
A. I don't believe I was here when they testified.
Q. You don't think you were here?
A. Why, I know I wasn't here when they testified. I haven't read their testimony.
380 Q. Did you tell Kinney—you say Kinney was right there, didn't you, at the time of this alleged conversation that you say Mr. Carroll told Kinney it was O. K. to go on? You were there at the time, weren't you?
A. Yes.
Q. Did you tell Kinney—did you warn him that that packing was unsatisfactory?
A. No, sir.
Q. Did you warn him at any time at all that the engine was not in proper shape?
A. No, sir.
Q. You let him go out knowing the things which you claim you knew? Is that right?
A. He took the engine out by Mr. Carroll's orders.

Q. And do you consider you were doing your duty towards the company, if that was true, no matter what Mr. Carroll said?
A. Yes, sir.
Q. That you considered your duty? You didn't consider it your duty to tell the truth there or to have the truth known to the man who was taking out the engine? Is that right?
A. No, it is not right.
Q. You stood by, did you, and permitted this engine which you say you knew was defective, to go out?
A. I told Mr. Carroll what was wrong.
Q. But you didn't tell the man who was going to use it, did you?
A. No, sir, I did not.
Q. And you stood by there and heard that?
381 A. Yes, sir.
Q. And knew that he was going to take that engine out?
A. Yes, sir.
Q. And didn't open your mouth on that subject?
A. I didn't reverse Mr. Carroll's orders.
Q. You didn't open your mouth, did you?
A. I didn't say anything.
Q. If the piston had been cut it would show on the packing would it not?
A. Yes, sir.
Q. Did you ever make any examination to see whether it had been cut or not?
A. No, sir.
Q. Neither before nor afterwards?
A. No, sir.
Q. So that what information you got came from these two men who were doing the repairing, you claim?
A. Yes, sir.
Q. Not from your own knowledge?
A. Not from my own knowledge; just from them.
Q. Now, you say that this engine had been taken off of road work?
A. It was used in short run work.
Q. You said it had been taken off of road work, didn't you, in your direct examination?
A. It was what was classed as a short run engine.
Q. Where did you see it classed as a short run engine?
382 A. I knew it.
Q. You said it was classed? Where did you find that classification?
A. I knew it was only used on short run work.
Q. How long did you know that?
A. Oh, it had been in short run work—well, it was in short run work at the time I was at the West Shore house.
Q. When was that? How long was that?
A. Well, it might have covered three or four days. I couldn't say anything more about it.
Q. You couldn't say anything more about it?

A. No, sir.

Q. Aren't engines some times used—when necessity requires it, they may be taken off and used for yard work for two or three days and then put back on the road again?

A. Well, at that time there were a certain number of engines that were listed, that were not fit for main road work, main line work.

Q. Did you see this engine listed?

A. No, sir.

Q. All you know about it is that for two or three days that engine had been used in the yard there? Is that right?

A. For short run work.

Q. For yard and short run work?

A. Yes, sir.

Q. Do you call Tonawanda short run work?

A. Well, flanger—yes.

Q. You would call that short run work?

A. Yes, sir.

Q. Would you call Rochester a short run work?

383 A. No, sir.

Q. Would you call Syracuse a short run work?

A. No, sir.

Q. Did you know that that engine had been repaired, used at Rochester, October 1st at Dewitt?

A. If those reports were made out there, why——

Q. These reports have been offered here in evidence. It was repaired at Syracuse or at least at Dewitt. That was a long run, wasn't it?

A. Yes, sir.

Q. That was road work?

A. Yes, sir.

Q. And October 4th we had her repaired at the Rochester shop. That was long run work, wasn't it?

A. Yes, I would consider that main line work.

Q. So that all you know about her being used for yard work or short run work was that she had been used in your yard, used in the yard for two or three days before this accident happened?

A. Yes, sir.

Q. You never were over the engine yourself, were you? You never examined it?

A. Not that I remember.

Q. Personally, you do not know that she was unfit for road work, do you, of your personal knowledge?

A. I remember that that engine was a short run engine.

Q. No, sir, of your personal knowledge can you say that she was unfit for road work?

A. No, not of my personal knowledge.

384 Q. And you never saw any bulletin that said she was unfit, and assigned her to yard work, did you?

A. No, sir.

Q. Now, if the piston was cut, there would be no trouble about

seeing it, would there? These men would have no trouble in seeing it who were making the repairs, would they, on the packing?

A. No. They would notice it, yes, sir.

Q. What do you mean by a cut on a piston?

A. Well, a cut piston is—usually the surface of the piston is marred, on the lower side usually by passing back and forward through the cylinder head.

Q. Is that through the packing?

A. Yes.

Q. Caused by the soft metal?

A. No, the cut would not be caused by the soft metal. Probably the piston would be worn out considerably smaller than the cylinder, which would allow the piston rod to work back and forward over the cylinder head which is cast iron, and that would tear the piston rod.

Q. The men who were packing this could very easily see the scratch, could they, both on the piston rod, and could also see its effect on the piston rod? You said they saw it.

A. Yes, they told me.

Q. And it would be very easy for them to see its effect on the piston rod, and know it?

A. Yes, sir.

385 Redirect examination.

By Mr. Ward:

Q. Just a couple of questions. Who didn't you take the piston rod out?

A. Well, I couldn't do that of my own free will. I had no jurisdiction over that.

Q. Where did you have to get authority to do that from?

A. I would have to get that from Mr. Carroll.

Q. Was there a foreman that had charge of the repairs on the boiler?

A. Yes, sir.

Q. Who was that?

A. A man by the name of McMurray, I think.

Q. Did you have anything to do with those repairs on the boiler?

A. No, sir.

Mr. Ward: All right.

Recross-examination.

By Mr. Spratt:

Q. Didn't you have any authority out there of any kind at all? Were you just an ornament out there?

A. No, sir.

Q. Were you there just as an ornament?

A. No, I did a lot of work around there.

Q. But you didn't have anything to do where anything was wrong with an engine? Was that it?
A. I distributed the work to these men.
Q. But whether the work was done properly or not, that didn't interest you, I suppose, did it?
A. Oh, yes, it did.
Q. It didn't interest you at all, did it?
A. Yes, it did.
Q. And you had no interest in seeing that this piston was taken out at all?
386 A. Now, this engineer was waiting for this engine, you know, to take it out.
Q. If the engine was not in proper shape to go out, it was your duty not to have him take it out, wasn't it?
A. Well, as I said before, I reported it to my superior, whose duty it would be to take it out of service.
Q. You were a sort of megaphone out there, were you? That is you simply transmitted it, and when that was done you considered your duty fully performed?
A. My duties began some place and ended some place.
Q. When you reported there was anything wrong that is all you had to do?
A. I considered my duty——
Q. You considered your duty fully performed?
A. Yes, sir.
Q. And you were entitled to compensation for it?
A. Yes, sir.

Mr. Spratt: That is all.
Mr. Ward: That is all.

JOHN MCMURRAY was duly sworn as a witness in behalf of the plaintiff:

Direct examination.

By Mr. Ward:

Q. Mr. McMurray, you were the man who had charge of the boiler part of the business under Mr. Carroll, weren't you?
387 A. Yes, sir.
Q. Out in the roundhouse where 2499 was on the 12th of October, 1908?
A. Yes, sir.
Q. Have you got a book?
A. No, sir.
Q. Don't you keep a book of the work that you do?
A. I had a book, and the book went to Depew.
Q. Got burned up in that fire?
A. Got burned up in the fire.
Q. What did you do on this engine that Mr. Ross told us what he did?

A. I didn't do any work.
Q. Do you know of anybody else doing anything under you?
A. No, sir.
Q. Did you work days or nights?
A. Days.
Q. You were the foreman over that part of the work when it was to be done days, weren't you?
A. I was.
Q. Had to be done according to your orders?
A. Yes, sir.
Q. So far as you know there wasn't anything done?
A. There wasn't anything done.

Mr. Ward: All right.

Cross-examination.

By Mr. Spratt:

Q. Do you mean that there wasn't anything done or that you have no recollection now?
A. There wasn't anything done. There was no work reported to me that day on that engine.
388 Q. How do you know that? Have you got your books?
A. No, I have no book.
Q. How do you recollect that there was no work reported to you on that day?
A. I had no work report on that engine that day.
Q. How do you know that, Mr. McMurray?
A. If I had had any work there would have been work reported to me on it.
Q. How would it be reported to you, in what way?
A. Through the work clerk.
Q. And that is in writing, is it?
A. Yes, sir.
Q. You yourself wouldn't do the work?
A. I wouldn't do the work.
Q. How many men did you have in your gang?
A. 16 boiler makers.
Q. And you were there in the daytime?
A. Yes, sir.
Q. And what work was done during the night you have no personal knowledge of?
A. No, I wouldn't know nothing about that.
Q. And what work was done by the men during the day you don't know only what was returned to you by your reports?
A. That is all.
Q. You don't recall what those reports were now, do you?
A. No, I don't remember them.
Q. And what work was done on this engine either the 9th or 10th of October, just before this accident, 1908, you do not know?

389 A. No, sir.

Q. How did you keep your reports before they were turned in?

A. I couldn't tell you that. I didn't see the reports—the reports were kept by the work clerk. I just get a duplicate of the report which he copied from the work report and given to me, and then taken back to the work clerk.

Q. Do you know where the duplicate is?

A. No, sir.

Q. You can't tell from that duplicate or the report what work was done on this engine?

A. I do not.

Q. That is, when you said in answer to the counsel's question that there was no work done, do you mean to say——

A. No boiler work, not in my time, not in my shift in the day time.

Q. I say, you haven't got it?

A. No, I haven't got it.

Q. You don't know whether there was or whether there was not?

A. I don't know.

Q. You don't know now?

A. I don't know now.

Q. There might have been work done on it?

A. At some other engine house.

Q. I say, there might have been some work done on that engine the night before you came on duty?

A. Why, yes, I wouldn't know that.

Q. And might there have been some work done on that engine by your men during that day that you wouldn't recall now?

390 A. Why, there might have been but I don't remember that there was.

Q. Is it so long ago that you can't remember?

A. It is quite a while.

Q. Did a great many engines pass through your place out there each day during 1908?

A. Yes, a good many.

Q. For repairs? Could you after this long space of time tell without your reports what engines were repaired?

A. No, sir.

Q. In October, 1908?

A. I could not.

Q. Repairs are done on engines at the other roundhouse to-?

A. Yes, sir.

Q. In Buffalo?

A. Yes, sir.

Q. If the engine was out on the road, for instance, at Rochester or Syracuse, repairs might be made there?

A. Might be made there.

Q. Are you a little deaf?

A. Yes, sir, a little deaf.

Q. On account of working around the boiler shop?
A. The noise.

Mr. Ward: Repairing leaks in the bellies of boilers:

By Mr. Ward:

Q. Mr. Spratt didn't get out there and repair that engine, did he, Mr. McMurray?

Mr. Spratt: No, and I will concede you didn't.

391 Q. Mr. Spratt didn't get out there and repair that boiler, did he?

A. I didn't see him.

Mr. Ward: That is all.

JAMES J. CUNNINGHAM was duly sworn as a witness in behalf of the plaintiff.

Direct examination.

By Mr. Ward:

Q. Mr. Cunningham, you work for the New York Central?
A. Yes, sir.
Q. What do you do?
A. Terminal foreman.
Q. What were you in 1908?
A. Terminal foreman.
Q. What does that mean?
A. General foreman.
Q. Did you have charge of a roundhouse?
A. Yes, sir.
Q. What roundhouse did you have charge of?
A. Known as the old house—the New York Central house.
Q. Is that what they call the East Buffalo house?
A. Yes, sir.
Q. Did you make any repairs at your house in the fall of 1908 on engine No. 2499?
A. She had been in there several times.

Q. Did you make any repairs on her?

392 A. Not to my knowledge.

Q. You have been asked this question on every trial of this action, haven't you?

A. What question is that?
Q. Whether you made any repairs on that engine?
A. Yes.
Q. And answered it the same way?
A. I don't remember how I answered the other one.
Q. Your attention was called to this engine on the first trial of this action, which occurred in 1909, about a year after the accident?
A. Yes, sir.

Q. And you were asked for any records of any repairs at that time, weren't you, Mr. Cunningham?
A. I don't believe I was asked for any records.
Q. Have you any records?
A. No.
Q. Did you ever have any?
A. Never kept them over 30 days.
Q. Can you now tell whether or not the leak in the belly of the boiler was repaired at your roundhouse at any time in the fall of 1908?
A. I didn't know that the engine had a leak in the belly of the boiler.
Q. Then, you don't know whether it was ever repaired or not?
A. I don't know as there was a leak there.
Q. I appreciate that. Do you know whether there was ever any repairs made?
393 A. No, sir.
Q. At that time there were only two engine houses in Buffalo of the New York Central, weren't there?
A. No, there was other roundhouses.
Q. Where repairs on engines were made?
A. Some minor repairs.
Q. The two main houses were the house that you were the head of and the house that Mr. Carroll was the head of?
A. Yes.
Q. Practically all of the substantial repairs on engines operated by the New York Central in Buffalo at that time were made in either one of those two houses, weren't they?
A. Yes.
Q. And you have no record of any repairs made on this engine in this house in the fall of 1908?
A. I don't recall them now.

Mr. Ward: That is all.

Cross-examination.

By Mr. Spratt:

Q. You said that there weren't any repairs made to your knowledge? What do you mean by your knowledge?
A. I don't remember now.
Q. That is, you can't recall?
A. No.
Q. There might have been repairs made there on this engine about that time, but you can't say specifically? Can you say——
A. There were several repairs made on all engines.
394 Q. How large a roundhouse did you have there?
A. We had about 47 or 48 stalls.
Q. And Mr. Kinney said the day he had this engine out and brought her back from Tonawanda he came right near to your en-

gine house. About how many men did you have, did you employ there in repair work there, in 1908?

A. I believe there was close onto two hundred.

Q. And were you in shape at your engine house, October 12th, 1908, to make repairs on an engine where she was leaking in the belly?

A. Yes, sir.

Q. Were you in shape to make repairs on an engine where she was leaking at a piston on account of the packing?

A. Yes, sir.

Q. Were you in shape so that you could make repairs to the steam pipes leaking underneath the spouts where the engineer sat?

A. Yes, sir.

Q. Was it your duty if Mr. Kinney had brought the engine there at that time to make those repairs?

A. We would either make the repairs or give him another engine.

Q. Did you have other engines there you could have given him?

A. Yes, sir.

Q. What was the practice of the company in case an engine was in such condition on account of escaping steam that the engineer could not see the signals?

395 A. On the road we get an order from the dispatcher to furnish another engine, to send it to a certain point.

Q. What right did the engineer have with reference to when an engine got in that condition? What were his rights with reference to that engine?

Mr. Ward: You don't claim he is an authority on the rights of the engineer? He has testified what he could do.

A. Our orders were when an engineer says his engine was not fit for road service to supply him with another engine.

Q. Was that the practice there in 1908?

A. Yes, sir.

Mr. Ward: You are going to take up a new subject with him now, aren't you?

Mr. Spratt: Yes, sir, that is, the piston being cut.

Mr. Ward: I have no objection, because I am practically through with my case, but still he is my witness, and I still want to ask him a question.

By Mr. Ward:

Q. If you had made any repairs on Kinney's engine, you would have had a record of it, wouldn't you?

A. At that time.

Q. Where are those records?

A. After 30 days they were sent to the master mechanic's office.

Q. Where is that?

A. That was at the old house at that time.

396 Q. That is still under the control of the company, isn't it?

A. Yes, sir.

Q. Those records are there yet?
A. No, they are sent from there to Depew, to the Superintendent of Motive Power.
Q. Did they get there before the fire or after the fire?
A. Oh, they go there every month; still go there.
Q. So that they were burned up?
A. I don't know.
Q. If they are there they would show, wouldn't they?
A. The building was burned.

Mr. Ward: That is all.

Recross-examination.

By Mr. Spratt:

Q. I presume you don't make the repairs yourself there, Mr. Cunningham?
A. No, sir.
Q. You are the head man in charge, and these repairs are made by men under you?
A. Yes, sir.
Q. It has been spoken of here about a piston being scratched or cut. What is meant by that?
A. They mean, I suppose—It was meant the piston rod was cut. That is done from grit getting onto the swab and scratching the rod. There is an oil swab on the rod.
Q. I show you here different parts—some kind of an appliance. (Showing to witness.) What do you call that?
397 A. That is piston rod packing, United States packing.
Q. What is this outside shell here (Indicating)? What is that?
A. That is what they call the vibrating cup.
Q. And is the packing packed inside the vibrating cup?
A. Yes. This packing is cut tapering, and the cup is tapering (indicating).
Q. Now, this (indicating) is the cup, is it?
A. That is the cup.
Q. It is tapering down—the sides are tapered down (indicating). What is the packing itself made of?
A. It is a mixture of babbitt and zinc, sal ammoniac.
Q. How many pieces are there used?
A. There is three rings split.
Q. Are the outside edges made to fit the cup, the vibrator?
A. The vibrating cup.
Q. What kind of material is it?
A. It is soft metal.
Q. That is, you could take a knife and cut it, could you?
A. Yes, it would peel off with a knife.
Q. Now, the piston runs through the hole here, surrounded by this packing that you have spoken of (indicating)?
A. Yes, sir. Will you allow me to explain?

Q. Yes, will you please explain it to the jury.

A. This vibrating cup goes into the head. They have this casted out for this to set in (indicating). Up against it is a brass
398 ring and a spring back of that. The spring keeps it set up against the vibrating rod. The packing leaks as a rule when it get- close together, so that the spring has no more tendency to close it in.

Q. That is, there is a little space left here between the two ends (indicating), so that it will have a chance to close in?

A. Close in.

Q. When that gets worn so that they come together it begins to get loose?

A. Yes, it is necessary to take it off and file off the ends, and put it in again.

Q. That is a simple job to do, is it?

A. Yes, 20 minutes.

Q. Is that an unusual*ly* occurrence at all to have the engine leak through the piston rod?

A. It is not an unusual report.

Q. That is there for the purpose of keeping the steam in, is it, so that you will get as much pressure as you can on the piston?

A. This is on the back head where the piston connects to the cross head (indicating). It stops the steam from coming through that opening on the outside. The front edge is solid.

Q. When the piston is first packed, or when you pack it or repack it, how about the steam escaping at first?

A. When a piston is in service for any length of time it wears to a certain movement of the piston. When the packing is bored out it is bored out center. When you apply new packing it has to apply to the rod before it stops it. That may not take long in some cases.

399 Q. If there are any scratches on the piston rod would their effect be shown on the packing?

A. They drag creases right through the soft metal.

Q. So that it would be very easy to see and discover, would it not?

A. Yes, sir.

Q. How could the piston be remedied so that it would stop scratching?

A. Why, it is very often done with a piece of emery cloth. Then again it is taken out and turned off.

Q. If it is done with a piece of emery cloth, does it take very long usually?

A. Oh, an hour. It may take two hours.

Q. If you take it out and turn it, how long would it take?

A. Oh, it would take five or six hours to turn off the rod and put in again.

Q. If you put in a new one?

A. That would be just the same movement with a new one.

Q. Old packing, when it is readjusted with the ends filed, as you say, state whether or not it is better than new packing entirely.

A. It is better for that rod because it has already been taken to that rod.

Mr. Spratt: That is all.
Mr. Ward: That is all.
Mr. Ward: I would like to say to the court—perhaps Mr. Spratt will accept my statement—that the physician who has examined Mr. Kinney, and testified on the previous trials, Dr. James
400 A. Gardner, is in Florida. I only found it out the day before yesterday. I would like to read his testimony.
Mr. Spratt: I consent to it. I stipulate that his testimony was given by the doctor in May, 1917.
Mr. Ward: Yes.

(Mr. Ward read the testimony of Dr. James A. Gardner, from page 403 of the Appeal Book on the fifth trial, as follows:

"James A. Gardner, M. D., called in behalf of the plaintiff, and being duly sworn, testified as follows:

Direct examination.

By Mr. Ward:

Q. Dr. Gardner, you are a practicing surgeon and physician?
A. Yes, sir.
Q. And you examined Mr. Kinney?
A. Yes, sir.
Q. Will you be kind enough to advise the court and jury about your experience in hospitals and surgical work?

Mr. Hollister: We admit he is qualified.

A. I served after I graduated 2 years and 9 months in Bellevue Hospital in New York City. I came here to Buffalo, and
401 since that time I have been connected with the Emergency Hospital for 7 years, I have been attending surgeon at the Columbus Hospital, at the German Hospital, I am at the present time, and I have done surgical work at other hospitals here in Buffalo.
Q. When did you see Mr. Kinney first, doctor?
A. About a year after the accident.
Q. What was his condition then?
A. At that time when examining him I found the stump of his right leg where it had been taken off below the knee. At that time the stump was still tender, the knee joint had an inflammation which we speak of as a synovitis. The joint of the hip where the iliac—rather I should say where the spine fits into the pelvis, which is known as the sacroiliac joint—there was a relaxation of that joint so that the movement of that joint gave him pain. I found on his left leg that his ankle was stiff so that it could neither be turned from side to side nor could it be extended or flexed. In walking he had to use the foot as you would a rocker, that is, striking the heel first, and then rolling over and coming on the toe. He used the outside of his foot in walking because of the false position of the foot and little toe, a large callous. This faulty position

of the ankle causes him in walking to bring upon muscles that use that should not be used, therefore in the use of these muscles he threw himself over so that it brought about this relaxation that I speak of as the sacroiliac joint in the lower part of the back.

402 Q. Well, was this trouble with the back, doctor, due to some original injury, or had it developed as the result of his trying to walk?

A. It has developed from his faulty method of walking. He has got to walk over on this side (illustrating). He does not walk so as to bear his body straight, and therefore his sacroiliac condition is secondary to the incorrect walking on the side of this leg, or this foot, I should say, his left foot. And he also has a certain amount to do because he is using an artificial leg on the other side. I think it is quite difficult to say that it is all on one side or the other, but it does bring in this faulty position in walking which he has referred to this bone that sets in the pelvis and the spinal column. It comes down there (indicating). The lower end of the spinal column is a "V" shaped bone, like a piece of pie, that fits into the pelvis, and that is what we call the sacrum, and on each side of the sacrum is the pelvis, and that is why it is spoken of as the sacroiliac joint, and it is there when you bend over that you feel a "crick" in the back. It is that joint that is moved, and hurts.

Q. You understood at the time, doctor, you examined him, that he had received an injury at that point at the time his legs were injured?

A. I did understand that, but he has had that pain each time that I have examined him since, so that I felt that this condition, if it were caused originally by the accident, if he could have walked properly, that that might have gotten over, should have gotten over, but that his faulty position in his walking, each time I

403 have seen him I found this condition, and so that I feel that it is his walking in a way that strains his sacroiliac joint, because of the artificial leg on one side and his walking on the outside of his foot on the other.

Q. Now, you have seen him from time to time since, haven't you doctor?

A. Yes, sir.

Q. And is his condition not any different from that which you described?

A. You mean improved any?

Q. Yes, sir.

A. I think that the stump is tougher. He gets along on that as most patients do. As times goes on, the stump that has been amputated becomes tougher, that is, along the knee joint, of his right knee, in which the synovitis was more marked. At the present time you can get crackling there, showing that there is still some irritation in that membrane, but that is better. On the other hand, the other leg is just as bad as it was when I first saw him. Each time there have been the callouses on the outside of the foot, showing the irritation from the walking, and that has remained just the same.

Q. Is there some contraction of the cords or muscles there that draws the toe up there, doctor, of the left foot?

A. There is contraction of the flexor muscles of the toes, which—the toes contract.

Q. What bones were broken there in that left foot, do you remember?

404 A. Well, I don't remember specifically what bones were broken, but the bones were sufficiently injured so that in the healing it has left a stiff joint, that the ankle can neither be turned from side to side nor the foot extended or flexed, as a normal foot should be.

Q. Can this man expect any further improvement?

A. I don't think so.

Mr. Ward: That is all.")

(Cross examination read by Mr. Spratt as follows:

Cross-examination.

By Mr. Hollister:

Q. Well, when you say a stiff joint you don't mean strictly speaking stiff, but that it is a limited motion of that joint, isn't it?

A. Yes, very limited, yes; he can't——

Q. Now, he can flex; he has some flexion there?

A. Yes, sir.

Q. You have seen him flex the foot?

A. Yes, sir.

Q. A stiff joint is one——

A. (Interrupting.) Any flexion absolutely?

Q. Yes.

A. He can get some, but it is the restricted motion that causes him to use it as a rocker.

Q. Well, he has extension of the joint to some extent?

A. Very little.

Q. Full flexion and extension are present?

A. To a very limited extent.

Q. This, whatever grating you speak of the knee joint,

405 that is frequently found as the result of rheumatism?

A. Yes, it may have deposits of lime salts if you have that. Any inflammatory condition of this sac causes it, whether it is from trauma or disease, anything so that the fluid which should lubricate the joint is absorbed, then you have a dry mucous membrane there, and you get this crackling.

Q. That dryness would make a grating sound?

A. Yes, sir.

Q. That you hear in the knee?

A. Yes, sir.

Q. The leg that was amputated, the stump is in a healthy condition now, tough condition?

A. I think it is in a very good condition, considering the accident, yes, sir.

Mr. Hollister: I think that is all.
Mr. Ward: That is all, doctor.")

Mr. Ward: I offer in evidence notice under the Employers' Liability Act of the State of New York, found at page 409 of the record of the trial before Justice Wheeler. You accept my statement of the service of that, Mr. Spratt? It was served by Mrs. Kinney, and I hate to ask her to come in.

Mr. Spratt: I don't raise any question, but I do object to it, as incompetent, irrelevant and immaterial, in view of the amended complaint that he is trying to recover now under the United States law, and this was served at a time when he was trying to
406 recover under the State law.

Mr. Ward: It is for the court and jury to say which law we can recover under, the court having held we can recover under both.

Mr. Spratt: I take exception to it.

The Court: I am going to present this case to the jury to consider under both the State and Federal laws, as they shall find.

Mr. Spratt: I have an exception to your Honor's ruling on that point.

Mr. Ward: Then, as I understand it, Mr. Spratt has permitted me to offer my notice, and has stipulated that it was served as alleged in the complaint.

Mr. Spratt: Yes. The only thing I stipulate is that it was served as alleged in the complaint. All the rest I take objection to it being introduced on the grounds I have stated.

The Court: It is received.

Mr. Spratt: In view of the admission of the notice, I move to strike out the evidence as to interstate commerce given in this case.

The Court: Motion denied.

Mr. Spratt: Exception.

(The notice received in evidence reads as follows:

"To the New York Central and Hudson River Railroad Company:

407 Take notice: The undersigned has a claim and cause of action against you, and hereby notifies you hereof, in accordance with Chapter 600 of the Laws of 1902. He was injured while in your employ on the 12th day of October, 1908, at North Buffalo Junction in the City of Buffalo, N. Y.; that the cause of his injury was a collision which occurred between Michigan Central engine No. 7916 and New York Central engine No. 3784; that such collision was brought about through your negligence and carelessness and the negligence and carelessness of your employees in failing to provide proper rules and regulations for the operation of your trains, cars, switches and signals, and in failing to properly operate the signals, lights and switch towers at the point of the accident, and in failing to provide the undersigned with competent fellow servants, and failing to warn him as he approached the said point of collision of the dangers then and there existing, and that such collision was further due to your failure to provide the undersigned with a safe and suit-

able engine, and to the fact that the engine operated by the undersigned was defective and unsafe, and leaked steam, so as to obscure the vision of the undersigned, and to prevent him from operating the same in a safe and proper manner.

Dated, February 6th, 1909.

JOHN W. KINNEY."

408 Mr. Ward: I offer in evidence the Carlisle expectancy table, showing the expectancy of Mr. Kinney at 51 to be 20.39 years, and at 52 to be 19.68 years.

There is only one of your men that you kindly produced for me who isn't here, Mr. Sullivan. I am perfectly willing to read his testimony.

Mr. Spratt: Sullivan was here, and taken with the grippe, yesterday, I understand, and went home. I am willing you should read his testimony.

(Testimony of Joseph Sullivan, taken from the Appeal Book on the Fifth Trial, page 134, was read as follows:

"JOSEPH SULLIVAN, called in behalf of the plaintiff, and being duly sworn, testified as follows:

Direct examination.

By Mr. Ward:

Q. Mr. Sullivan, you are the foreman of the boiler repairs?
A. Yes, sir.
Q. In one of the roundhouses of the New York Central?
A. At the main line house, New York Central.
Q. And where did you work for them in October, 1908?
A. The same house.
Q. The same place?
409 A. Yes, sir.
Q. You have got a book, haven't you, that you kept a record of various engines in?
A. Yes, sir.
Q. You produced it here in court on a previous trial under a subpœna?
A. Yes, sir.
Q. And you have got it yet?
A. Yes, sir.
Q. Will you take that book and turn to the record of engine 2499?
A. Yes, sir. (Producing book and referring to same).
Q. Now, before I ask you what your book shows, Mr. Sullivan, I want to ask you about these things here, referring to a sample of boiler flues. What holds the flues in place in a locomotive boiler? (Referring to piece of metal).
A. Why, the front and back flue sheet.
Q. And how are they prevented from sliding back and forth through a flue sheet?
A. Well, right in here, the flues goes in from this side; the front

end is put right in here, but before the flues is applied a copper, you can see right here, put in, open the flue up with a pin, then turn the flue half over with what we call a prosser, they drive that prosser in, and you can put your finger right in there and see the impression of the prosser right in here, open up the flue in here, then after the flue is prossered off we put a roller in and roll that out, and after that is rolled over, then we take a beading tool and bead that
410 tube up against the sheet. This fastens the flue to the sheet on this end. (Indicating).

Q. Is this place where the end of the flue seems to have been turned over what you call the beading?

A. Yes, that is the beading.

Q. Now, what is the beading for?

A. To brace the flue up against the sheet.

Q. To prevent leaking?

A. At times, yes.

Q. To prevent leaking to hold the flue steady?

A. Yes, sir.

Q. Now, was an examination made of that engine 2499 on the 6th of October in your shop?

A. October the 6th, 1908.

Q. And what entry have you got in your book on that day about that engine?

A. For October the 6th, 1908?

Q. Yes.

A. (Referring to book). 'Flues fair. 15 flues with the heads off, and crown bolts leak.'

Q. Did you repair that engine after the report of Engineer Fox on the 1st of October?

A. Well, we made repairs on it on October the 6th, when I got the condition.

Q. Did you repair it after October 1st in reference to the jacket?

A. No.

Q. How?

A. I couldn't remember anything only on October the 6th.

Q. Have you got any record of having repaired it after the report of Engineer Fox of October 1st?

411 A. Nothing after October the 6th.

Q. Did you caulk the leak under the belly of the boiler as reported by Engineer Ames on October 4th?

A. I wouldn't say I had the boiler on October 4th.

Q. Did you caulk the leak in the belly of the boiler after October 4th?

A. I didn't notice the leak on the belly of the boiler. If I had I would have it down here on this condition book.

Q. You haven't that on your book there?

A. No, sir.

Q. And you did not repair any such leak, did you?

A. No, sir.

Q. Did you repair the jacket of the boiler?

A. I don't repair the jacket on the boiler.

Q. What part of the boiler do you handle?
A. The boiler only.
Q. Just the boiler?
A. Just the boiler.
Q. Did you repair the flues at any time before October 6th?
A. Well, I wouldn't remember that, Mr. Ward.
Q. Well, you put down what you do on that book, don't you?
A. That is on October the 6th?
Q. Is that the only entry you have got after October 1st, the one you have read us?
A. That is all I have got, is October the 6th, 1908.
Q. And you put down everything you do in the book, don't you?
412 A. The condition.
Q. What?
A. The condition of the boiler.
Q. And do you put down what repairs you make in that book?
A. No, not in this book, because this is only a condition book.
Q. Well, do you make a note of the repairs?
A. I didn't have any book, only on forms.
Q. After you had repaired the belly of that boiler, Mr. Sullivan, you would have a note of it, wouldn't you?
A. If the boiler was caulked I would have it in this book and the engine would be taken out of service.
Q. If it leaked at the seams?
A. It would be caulked.
Q. You would have that, wouldn't you?
A. No, not in this book.
Q. Where is the book that you would put that in?
A. I didn't have any.
Q. Have you any recollection, or have you ever had, of doing any work on that engine after October 1st, except what related to the flues and the crown sheets?
A. No, but I do remember doing—we have handled the engine in September, but I don't remember anything after October.
Q. All right, Mr. Sullivan.
A. Between October the 1st. and 6th.
Q. When the beads are off the flues what do you do with the flues?
413 A. Well, I got here 15 flues with the beads off. Now, that might be partly off.
Q. It don't say 'partly off' in your book, does it?
A. No, it don't say 'partly off' in my book, but if they are half off we take a roller and we roll that out again. That is what we call the flue roller.
Q. Suppose they are all off?
A. Well, we can roll it off then, provided always if the flue is heavy, but if the flue is light we renew the flue.
Q. That is, you have to take the flues out, don't you?
A. Yes, sir, if the flue is light.
Q. And that is a job that takes several days, doesn't it, to take the flues out of a boiler, Mr. Sullivan?

A. Well, no.
Q. How long does it take?
A. They can remove them, take them out in three days, in the shop.
Q. In three days?
A. Yes.

Mr. Ward: That is all.")

(Cross-examination read by Mr. Spratt as follows:

Cross-examination.

By Mr. Hollister:

Q. So far as the work on these flues is concerned, that entry shows that the work was done as you have described it?
A. Yes. The flues was tightened up after the engine fire was knocked out of the fire box.

414 The Court: I do not understand it shows any work at all; it just shows the conditions, as he says, and a memorandum of repairs was entered somewhere else, if any was kept.

By the Court:

Q. Is that right?
A. What is that?
Q. I understood from your direct testimony that this entry in this book simply related to the condition before any work was done.
A. That is all.
Q. And there is no entry there tending to show any work done, actually done.
A. No.
Q. Whatever entries there were in regard to repairs actually made were entries made elsewhere?
A. Yes.

By Mr. Hollister:

Q. And the record of the work done, these reports show the names of the men who made the repairs shown on this printed original report?
A. Yes, sir.
Q. Now, how many boiler makers were there there, Mr. Sullivan?
A. Where I am?
Q. Yes.
A. Why, I got 12 boiler makers.
Q. How many?
A. 12.

Q. And any one of those boiler makers, or several of them,
415 might be working on the flues here?
A. At times.

Q. Yes.

A. At times, yes.

Q. You would not yourself do all the work on the boilers required?

A. No, I don't do no work.

Q. I see. Now, whatever leak there is from a flue is an external leak, isn't it, Mr. Sullivan?

A. At the time it is leaking.

Q. Yes. In other words, it goes down into the fire box?

A. Down into the fire box.

Q. And, no matter how many flues may be leaking, there is no steam that goes outside the engine externally?

A. No, no, that would not interfere with it.

Q. Would not interfere in any way with any engineer's view, for instance?

A. No, sir.

Q. That would have nothing to do with it?

A. Just taking the engine out of high steam, causing low steam.

Q. Yes. And where you have the notation of the beads off do I understand you that that may refer to a portion of the bead being off?

A. That is it.

Q. It does not necessarily mean that the entire head is off?

A. No, it does not.

Q. And that is the way your record is so intended to read?

416 A. That is it.

Q. Or to be construed. That is your expression for any part of the bead needing turning off, you say the bead is off?

A. Yes.

Q. Now, with the number of boiler makers you have there how long would you say it would take to renew, as you have described it, the beading on 15 flues, where they needed to be headed over?

A. Well, that would depend upon the location of the flues in the fire box. If they were directly behind the steam pipes or the exhaust pot, it would take longer. If they were over the exhaust pot and about the center of the fire box we renew the front end and possibly have the flues out by night and renew the flues the next day and have them fit for service. That is what you call a roundhouse job.

Q. And so far as that shows, was that a roundhouse job required on the flues?

A. Well, at that time the fire was knocked out, and possibly the flues were leaking, and I went in and found the notation of 15 flues with the beads off, I came in and put it on the book here, and then I put boiler makers in there to tighten them up.

Q. That is a roundhouse job?

A. That is a roundhouse job.

Q. How many flues are there all together that come through here (indicating)?

A. Well, now, I just forget. On engine 2499, though, I think there was something over 400.

417 Q. And it is not an uncommon thing, is it, to have 15 flues at points in the beads leaking on an engine?

A. No.

Q. Coming in on the road?

A. No, when they get to that condition they are pretty near due for shopping, for general overhauling.

Q. So, so far as these 15 were concerned, that could be repaired at the roundhouse?

A. It could be, yes, sir.

Q. But regardless of the repairs of that character that had nothing to do with the steaming of the engine outside, as I understand?

A. Not a bit.

Q. Now, what is the other point that you speak of there, or the other notation?

A. "Crown bolts leak?"

Q. Yes. Now, that has reference to what part of the engine?

A. That is up on top, up on the roof sheet.

Q. Over the fire box?

A. Well, it is the roof of the fire box.

Q. It is the roof of the fire box?

A. Yes.

Q. So that if there is any leak from the crown sheet it goes into the fire box?

A. Yes.

Q. So that if there is any leak from the crown sheet it goes into the fire box?

A. It comes down.

Q. No external leak about that at all?

A. No.

418 Q. So that whether or not either of those items were repaired it would not any way affect the steam that would escape outside of the engine?

A. Not a bit.

The Court: In other words, it would go up through the stack.

By the Court:

Q. Into the air; is that it?

A. Yes. Well, it wouldn't go up through the stack; it would go into the fire box.

By Mr. Hollister:

Q. It would tend to put out the fire, wouldn't it?

A. Well, if the flue had busted. We have had a fire go out on account of a flue being busted, on account of the smoke blew out in the fire box, it would put out the fire, but I never knew of a case where the flue was leaking where it put out the fire.

Q. Now, in addition to the boiler men that work on repair jobs on boilers, were there other sets of men working on these crown bolts and other points?

A. No, we just have the one gang in, and they would finish up all that was leaking in the fire box.

Q. But you had to do with that particular place, didn't you, with the boiler and the fire box?

A. Yes, sir.

Q. Other points, other parts of the engine, if there was anything to be repaired, would be done by other gangs?

A. Well, no. Possibly it would, at times it would, it de-
419 pends on how quick they wanted the engine. If they wanted the engine in a hurry I would double up on it, put four men on instead of two. If the engine had a broken stay bolt on the outside, put another gang on, if they wanted the engine right away see?

Q. Did the boiler men do the packing of the pistons?

A. Have nothing to do with that at all.

Q. How?

A. Had nothing to do with that.

Q. That was another class of men, wasn't it?

A. That was another class of men.

Q. That is what I mean; they had various repair gangs on different parts of the engine?

A. Oh, yes.

Mr. Hollister: I think that is all.")

Re-direct Examination read by Mr. Ward as follows:

"Redirect examination.

By Mr. Ward:

Q. Well, then, Mr. Sullivan, just see if I understand you. Now, you were sworn upon the first trial of this case, which happened in 1909, or 1910, shortly after the accident, weren't you?

A. Yes, sir.

Q. And you have given about the same testimony on each trial?

A. Yes, sir.

Q. Now, you could not tell us on the first trial whether these repairs were ever made or not, could you?

420 A. Well, Mr. Ward, I don't think I was asked that question.

Q. Can you tell now whether these repairs were ever made or not?

A. Well, I can tell this, as long as I got the condition of that there boiler or fire box at that time, and them flues were leaking, I certainly put a gang of men in there.

Q. Do you know, can you tell this jury and Judge Wheeler now whether you took those flues out?

A. Oh, no, I didn't take them out.

Q. You can tell them that?

A. Oh, yes.

Q. Can you tell me whether the beading was gone or whether it was part gone?

A. Well, I couldn't remember that far back now. That would not be a fair question to ask me now.

Q. No, but you could not tell a year after, could you?

A. Well, it would not be a fair question then, a year after.

Q. Could you tell the name of a single man that did any work on those flues?

A. No, I couldn't.

Q. Were you able to tell it a year after the accident, when you were first asked about it?

A. No.

Q. Have you ever heard who the man was that fixed the 15 beads that you found off?

A. I don't know. I never made any inquiries.

421 Q. Do you know whether it took one day, or half a day, or three days?

A. No, I don't.

Mr. Ward: That is all. Has that item been read in evidence? I would like to have that entry read.

Mr. Hollister: That was read. The witness himself read it.

Mr. Ward: I would like to have it all read. (Reading:) 'October 6th, '08. Flues fair. 15 flues beads off. Crown bolts leak. J. Sullivan.'

Q. That is the entire entry, is it not, Mr. Sullivan?

A. The condition of that boiler.

Q. On that day?

A. That day.

Q. I read the whole entry?

A. Yes, sir.)"

Re-cross Examination read by Mr. Spratt.

"Recross-examination.

By Mr. Hollister:

Q. Now, when the men that you put on a job like that made their repairs it is put on one of these original motive power department reports, isn't it?

A. Yes, sir.

Q. And that is sent to the master mechanic's office?

A. Yes, sir.

Q. At East Buffalo?

A. Yes, sir.

422 Q. The reports in that office, that were at the office, that was the building that was destroyed by the fire, was it not?

Mr. Ward: After the first trial.

A. No, that was at Depew.

Q. What?

A. The master mechanic's office was not destroyed by fire, that was the superintendent of motive power.
Q. What was the building that the reports were filed in?
A. That is at the superintendent of motive power's office at Depew.
Q. At Depew?
A. Yes, sir.
Q. Was that the building that was destroyed by fire?
A. That was the building that was destroyed by fire.
Q. And the names of the men on the reports that are filed there that made the repairs?
A. I suppose, I believe so.
Q. They do not show in this book of yours at all?
A. No, sir.")

(Re-direct Examination read by Mr. Ward as follows:

"Redirect examination.

By Mr. Ward:

Q. When was that building burned up, Mr. Sullivan?
A. Oh, gosh, I don't remember. I had nothing to do with that, you know.
423 Q. You know it was burned up after the first trial, don't you?
A. I know it was burned up.
Q. You know it was burned up?
(No answer.)

Mr. Ward: All right.")

(Recross examination read by Mr. Spratt as follows:

"Recross-examination.

By Mr. Hollister:

Q. Do you understand that question?
A. He is asking me if I know the building was burned up. I know that it was burned.
Q. But he says 'Do you know if it was burned after the first trial or not?'
A. No, I don't.

Mr. Ward: Do you dispute that, Mr. Hollister?
Mr. Hollister: No, we do dispute that we had a notice, not that I ever saw.
Mr. Ward: You have got it in your files.
Mr. Hollister: No, I haven't. That is all.")
Mr. Ward: That is our case.
The Court: Plaintiff rests.
Mr. Spratt: I had the privilege of recalling Mr. Kinney before he rests.
The Court: Very well.

424 JOHN W. KINNEY, was re-called for further Cross Examination by Mr. Spratt, as follows:

Mr. Ward: I think the counsel should be limited in this to a reasonable extent. It was his duty to cross examine the plaintiff when he was put on the stand and not reserve his general cross examination for any later period. Of course if there was anything he overlooked I have no objection to that.

Mr. Spratt: I expressly asked that I be permitted to, because I was not familiar with and had not any time to read all the testimony that he offered before, and asked the privilege of doing this.

The Court: Proceed.

Q. Mr. Kinney, you say that you work on a farm?
A. Yes, sir.
Q. And you first were laid up about six weeks, were you, before you got out of the hospital?
A. Yes, sir.
Q. And then you were home about a year, were you, before you went to the hotel?
A. I didn't go to the hotel until April 3rd, 1912.
Q. And you said you were selling medicines, was it?
A. I undertook that.
Q. How long did you work at that?
A. About two weeks.
Q. And then you went to the hotel in 1912?
425 A. Yes, sir.
Q. And you were there how many months? Nearly two years were you there?
A. I was there from April 3rd, 1912, to December 15th, 1914.
Q. Then when did you go to the farm?
A. About May 25th, of 1915.
Q. And you have been on the farm ever since?
A. Yes, sir.
Q. How many acres have you got?
A. There is 75 acres in the farm.
Q. And you do your plowing with a sulky plow?
A. I have plowed with a sulky plow, yes, sir.
Q. How do you do your dragging? Do you use a cultivator?
A. I have used a riding cultivator.
Q. Do you have a seeder drill?
A. I haven't any of my own.
Q. But you can ride a drill, can't you?
A. I have rode a drill.
Q. And you ride a horse rake?
A. Yes, I have rode a horse rake.
Q. And a mowing machine?
A. Yes.
Q. And a binder?
A. Yes, I have rode a binder.
Q. And you have pitched hay? You pitch your hay, don't you?
A. No, I don't pitch it.

Q. To some extent?
A. No, I don't pitch it.
Q. Don't you pitch to some extent? I thought you said
426 here the other day that you did some of the pitching.
A. Why, I can pitch hay to the horses, feed the horses, yes, but I understood your question do I pitch hay in the fields.
Q. You said you did some pitching, and I was trying to find out what it was.
A. I can pitch a small forkful of hay in the manger.
Q. Do you milk your cattle?
A. I milk one cow.
Q. Take care of your horses?
A. Yes.
Q. Do you raise fruit on your farm?
A. Enough for my own use.
Q. How much of the year do you keep a hired man?
A. I never kept any strict account of it, but I keep him whenever I need him through the summer time.
Q. Do you hire him by the month or by the day usually?
A. Well, last year I hired him by the month, or I hired him for the harvest time.
Q. How about this year? Did you hire him for the harvest time the same?
A. That is the year I am speaking of—this past year.
Q. So that with the exception of the harvest time you do your work on the farm yourself?
A. No, not all of it.
Q. Do you hire other people at other times?
A. Yes.
427 Q. What part of the year do you hire others?
A. I have hired men to drill in grain when I wasn't able to do it.
Q. But that is not the usual thing? You do it yourself, don't you? Usually you have done it yourself?
A. In usual I have hired it done.
Q. Is it because you haven't a drill that you hire it done?
A. No, rent a drill and hire a man.
Q. Haven't you ever done any drilling yourself?
A. Yes, sir.
Q. I think you testified here, my recollection is that you were getting $180 a month, your average earning at the time this accident happened to you. That is what you testified, wasn't it?
A. I don't think so.
Q. What did you testify?
A. That I thought that that is what it would average.
Q. Do you remember being examined at the last trial: "(page 306) By Mr. Hollister: Q. You were just speaking about your average monthly wages, Mr. Kinney. Can you tell us what you were earning on the average the year before the accident, the monthly average wage? A. No, I couldn't tell exactly. Q. Well,

you mention $180. As a matter of fact it was about $135 a month, wasn't it? A. I couldn't say that it was, Mr. Hollister." Is that right?

A. Yes, sir.

428 Q. "Q. Well, don't you recall that we showed you that the amount that it amounted to $132 a month for the year 1907?" Did you answer, "I know that you showed me some figures." Is that correct?

A. Yes, sir.

Q. Will you swear now that your average wage for the year 1907 was over $132 per month?

A. I will swear that my answer there as you read it is correct.

Q. I am asking you regardless of this answer if you will swear that your average wage for the year 1907 was over $132 a month?

A. No, I wouldn't swear that it was.

Q. Do you remember of testifying with reference to the steam that obstructed your view, when you were asked on your direct examination by Mr. Ward: "Q. Now tell what happened in reference to the steam after you had observed this light green at Hertel avenue?

A. As I proceeded from Hertel avenue up to dwarf 6 it is up grade on a curve. It required using more steam than Tower I around to Hertel avenue, and the wind carrying the steam over on the right hand side, that is as the engine changed direction, changed her direction, that the steam blowing from the belly of the boiler and the left piston blew it under the boiler, and then up over the running board. It obscured my view so that I was not able to see dwarf 6 again from that time until the accident." Did you testify to that?

A. Yes, sir.

Q. So that your testimony was that it was the steam blowing from the belly of the boiler and the left piston that obstructed your

429 view of this dwarf? Is that right?

A. Yes, sir.

Q. And that is what did obstruct your view?

A. Yes, sir.

Q. In answer to a question that I put to you yesterday you testified that you never put your head out of the cab, did you not?

A. Yes, sir.

Q. And that is true, is it?

A. Yes, sir, that I remember.

Q. On the third trial on the morning of Thursday, October 17th, 1912, "John W. Kinney, Plaintiff, recalled for further cross-examination by Mr. Rourke, testified as follows: Q. Upon your return trip from Tonawanda, Mr. Kinney, you passed over this same track that you later were hurt upon?

A. Well, Mr. Rourke, before I answer the questions I would like the opportunity of correcting an answer to one of your questions yesterday.

Mr. Ward: What did you say, Mr. Kinney?

A. I said before I answered his questions I would like an opportunity to correct an answer to one of his questions that I answered yesterday.

Mr. Rourke: Your counsel will take care of you. You may make any correction that you wish so far as I am concerned now.

By Mr. Rourke:

Q. What is it?

A. The question in regard to having my head out of the
430 cab window from Hertel avenue up to the dwarf. I believe I answered no.

Mr. Rourke: My recollection is that to your own counsel you said that you were looking out of the front window.

By Mr. Ward:

Q. What correction do you desire to make, Mr. Kinney?
A. That I had my head out of the side cab window some of the time.
Q. Is there anything else?
A. No, nothing more.

By Mr. Rourke:

Q. You are through with such corrections as you want to make now?
A. Yes, sir."
Mr. Ward: Now that you have called his attention to it he may want to make the same correction this time.

Mr. Spratt: I object to being interrupted, your Honor.
The Court: Yes.

Q. Is that correct, what I have read here? Did that occur at that trial?
A. Before I——
Q. Is that correct, yes or no.
A. That you just read?
Q. Yes.
A. Yes, that is right.
Q. And that occurred, and you volunteered to make this correction yourself?

A. Yes, I will volunteer to make that correction now.
431 Q. Is that correct? Is that true?

A. Yes, I should say that it is true.
Q. That is, what I read last is true?
A. Yes.
Q. Now, you testified yesterday that the reason you didn't put your head out of the window to look was that by looking along the side of the engine you could see Mullen's signals better, did you not?

A. Yes, sir.

Q. In looking out of the window in front of the engine you could see better?

A. Yes, sir.

Q. Which finally do you say is the correct answer?

A. Both of them.

Q. They are both correct?

A. Yes, sir.

Q. Mr. Kinney, you stated here yesterday that your rate of speed in going from the tower up to dwarf 6 was 6 or 7 miles an hour?

A. Yes, sir.

Q. On the last trial did you testify on cross-examination (page 339): "Your recollection of it was just as good on the last trial as it is on this one, wasn't it?

A. I think so.

Q. And on the last trial you indicated you were running about 5 or 6 miles an hour, didn't you?" And did you answer, "I don't think I did." Is that correct?

A. What you have read there? Yes, sir.

Q. Well, page 88, (showing transcript of stenographer's minutes to witness): "Q. So that indicated you were running about
432 5 or 6 miles an hour, do you say?

A. I think I testified to that, yes.

Q. And was that about the rate?

A. Yes, sir."

A. What you have read there is correct.

Q. Which is correct, that you were running 5 or 6 miles an hour or 6 or 7 miles an hour?

A. Not being a speed expert I couldn't tell which was correct.

Q. You have sworn both ways?

A. I have sworn that was the best of my judgment.

Q. About being a speed expert, you had run an engine about how many years?

A. Eight years.

Q. And you have to run at times according to schedule, don't you, if you run a passenger train?

A. Yes, sir.

Q. And also at times on freight trains?

A. Yes, sir.

Q. And you know the distances on the road between different points?

A. I did at that time.

Q. And you carried a watch, I assume, and wouldn't you know from timing yourself all these years that you were working for that railroad, and running an engine or being fireman on the engine, about the rate of speed your engine was going at any time?

A. Not in a movement of that kind; that is, the specific rate of speed.

Q. Why wouldn't you know what speed it was going at that time?

433 A. Because it would be so slow that you would merely guess at it.

Q. Wasn't your judgment good?

A. I considered it so.

Q. Give us your judgment as to what speed you really were going at that time? Was it 5 or 6 or 7 mile- an hour?

A. It was between 5 and 7 I should judge, about as fast as a slow horse would trot.

Q. Did you testify at one time that it might be 8 miles an hour?

A. I might have said that it might have been 8 miles.

Q. So that you can't tell whether it was 5 miles or 8 miles an hour you were going?

A. The lower the rate of speed is the harder it is to fix it.

Q. You don't know?

A. No, I don't know exactly.

Q. You testified here yesterday during this trial that Mullen never gave you a stop signal at any time from the time you left the tower until the time the accident happened, did you not?

A. No.

Q. That is true? You testified to that, didn't you, that he never gave you a stop signal from the time you started from Tower I until the accident happened?

A. Have I got to answer that yes or no?

Q. Yes.

A. I can't do it.

Q. What is that?

A. I can't do it.

Q. Didn't you testify that he gave the same signal all the
434 time except that just before the accident he gave it a little more rapidly?

A. I testified yesterday to that effect, yes, sir.

Q. And that is true, is it?

A. Yes, sir.

Q. And you also testified that he never gave you a stop signal covering that space, didn't you?

A. I testified yesterday.

Q. Yes?

A. Yes.

Q. That is true, is it?

A. Yes, sir.

Q. I call your attention to the first trial at page 43 of the stenographer's minutes. This question was asked you:

"Q. Now describe the accident to us, Mr. Kinney. What was the first that you know of there being any other train there?

A. It was when the fireman jumped or when the brakeman changed his signal from a come ahead to a stop signal." Did you testify to that on the first trial?

A. Yes, sir.

Q. So that he did according to your testimony change his signal from a come ahead to a stop signal? You testified to that, didn't you, at the first trial?

A. I can't answer your question, Mr. Spratt.
Q. I will let you look at it and see (showing transcript of testimony to witness).
A. I say I testified as it is in the book there, yes.

Mr. Ward: Had you finished your answer?

435 A. I said I had testified as it was in the book. He won't allow me to explain.
Q. You testified as I read here?
A. Yes.

Mr. Ward: Yes, he will let you explain it, I am sure. I will ask you to if Mr. Spratt doesn't object if you care to. Have you any objection to Mr. Kinney's making such explanation?
Mr. Spratt: You may ask him.

By Mr. Ward:

Q. Do you wish to make any explanation of it?
A. Yes.
Q. What do you say?
A. I want to explain the difference in my testimony. I forgot rule 106. The form of the signal wasn't changed, but the speed of his signal was changed. In that evidence there is when I considered a stop signal, rule 106, but yesterday I forgot to mention—yesterday I intended there was no change in the form of his signal.

Mr. Spratt: I object to what he meant yesterday.

By Mr. Ward:

Q. Why did you take it as a stop signal?
A. Because of the change in the movement of the signal. The rapidity of the signal increasing brought it under rule 106.
Q. What is that rule 106?
A. In case of doubt or uncertainty take the safe course and no risk run.

The Court: Now we will take an adjournment.

436 Adjournment until Thursday, January 30, 1919, at 10 o'clock a. m.

Thursday, January 30, 1919—10 a. m.

JOHN W. KINNEY, resumed the stand for further Cross-examination by Mr. Spratt:

Q. Mr. Kinney, you testified on this trial that you asked the towerman at Tower I if he knew it was all clear and that he told you it was?
A. Yes, sir.
Q. That is true, is it?
A. Yes, sir. He told me that is was clear.

Q. Did you testify to that same thing on the second and third trials?

A. Practically so.

Q. On the second trial did you not testify as follows:

"Q. How did the towerman know you wanted to make that movement?

A. Because it is a movement that is customary at this point, and he judged from our movements.

Q. Then after the towerman asked you why you didn't go on the track you were standing on what did you say?

A. I said we would have to get permission to go on that track.

Q. And did you get it?

A. Yes, sir.

Q. From whom?

A. From the towerman at Tower I."

Q. So that you didn't ask the towerman anything about it being clear, did you?

Mr. Ward: May I make a suggestion?

A. I testified as it is there in the book.

437 Mr. Ward: There isn't any claim that the towerman told him he could go out on the main track. He could find that out by seeing the dwarf.

Q. You testified at this trial that the towerman told you it was all clear, didn't you?

A. Yes, sir.

Q. Now, is it true—did you testify as I have read here at the second trial?

A. Yes, sir.

Q. And didn't you testify substantially the same thing at the third trial?

A. I think I did.

Q. It was your duty to see the dwarf if possible, wasn't it, before passing it?

A. Yes, sir.

Q. If you couldn't see the dwarf, and you took signals from the brakeman, it was your duty to be sure about them before proceeding to pass the dwarf, wasn't it?

A. I don't understand your question in the form you have put it.

Mr. Spratt: Read it.

(Question read).

A. I don't know how to answer your question.

Q. If you couldn't see the dwarf, and you were taking your signals from the brakeman for that reason, it was your duty to be sure of the signals that the brakeman was giving before you went on past the dwarf, wasn't it?

A. It was my duty to be sure of the signals that the lookout was giving me, yes, sir.

Q. Mr. Mullen had never worked with you before that day, had he?

438 A. Not that I can recall.

Q. And that night was the first time that you ever took any signals from him by lantern?

A. I don't remember of taking any by lantern from him.

Q. That was the first time that you ever took any by lantern from him when you were going up to dwarf 6, wasn't it?

A. I can't recall taking any by lantern before.

Q. Before that time?

A. No, sir. They were hand signals.

Q. The proceed signal you claim was his raising the lantern from the leg to horizontal and then down and up? That is, from the leg up and then down and up (indicating)? Is that right?

A. That is the proceed signal, yes, sir.

Q. The lantern for a perfect come ahead signal would be in sight at each extreme of that signal, would it not?

A. It depends on where the man was standing.

Q. For a perfect signal, for a perfect come ahead signal that light would have to be in your view both at the beginning and ending of the signal, would it not?

A. Not from my experience I would say it wouldn't have to be.

Q. It wouldn't have to be?

A. No, sir.

Q. So that under your view of it you claim that it could disappear and yet be a perfect signal?

A. Yes, sir.

439 Q. And just as distinct a come ahead signal as though it had been in sight all the time?

A. If it was a distinct come ahead signal, yes, sir, to the man who was reading it.

Q. Just as distinct and perfect a signal as though it had been in sight all the time during the whole movement.

A. You don't know anything about——

Q. No, just answer my question.

A. I don't know how to give an answer to it.

Q. Say yes or no, then.

A. I can't answer.

The Court: You can say you can't answer.

Q. You can't answer.

A. I would like to answer his question.

The Court: You can say you can't answer.

Q. You can't answer?

A. No, sir.

Q. Now, you illustrated what your understanding of a come ahead signal was on the last trial, didn't you?

A. Yes, sir.

Q. And wasn't this how you described it pages 279 and 280: You were recalled for your own side on your direct, and Mr. Hollister asked you: "Q. Now in your own way describe so that—you have been listening to this business long enough so that you can do it as well as we can—describe the movement of that light as you have indicated here." Then you went on and described it. "Mr. Hollister: Now, if the court please, his indication was clear
440 to us all. We see what Mr. Kinney did. It was up and down this way (illustrating), and I would like to have it described as to the motions of the arm that he made. That is part of his testimony. We are getting by it, and we are getting in—the counsel is—other questions, and do not preserve that signal.

The Court: Well, it is up and down.

Mr. Hollister: It was up and down between the shoulder and the leg in that arc between those two.

The Court: Yes, that was it.

Mr. Hollister: Not down to the leg or up to the shoulder.

The Court: That was the motion that the witness made.

Mr. Ward: That being Mr. Hollister's view and it having been put on the record we will now take Mr. Kinney's view.

The Court: No.

Mr. Hollister: I ask the court if it is a fair description of the one he made.

The Court: I should say so."

That occurred, did it not, at the last trial?

A. I couldn't remember that particular point.

Q. That was the substance of it, wasn't it?

A. I couldn't say. There was quite a long conversation between counsel here and court, and I made no memorandum of it.

Mr. Spratt: Now I offer that part of the testimony of the last trial in evidence.

Mr. Ward: It is enough to have the conversation of counsel trying the case without having the conversation of counsel
441 trying another case. That is somewhat novel.

The Court: What is the purpose of it?

Mr. Spratt: To show that the light was in sight, that it didn't pass——

The Court: That is for the purpose of contradicting something this witness has said?

Mr. Spratt: Yes, something that this witness has said on this trial.

The Court: You think his statement at that time is contradictory of what he says now?

Mr. Spratt: Yes.

The Court: I will admit it then, and the jury will take it into consideration if they think it does contradict.

Mr. Ward: I except because it is not Mr. Kinney's testimony that he is putting on the record.

The Court: It is what the court seems to have said——

Mr. Ward: It is what the New York Central lawyer said, and what the court said.

The Court: And in conjunction with the attorney.

Mr. Spratt: And in the presence of Mr. Kinney.

The Court: And I will say to the jury that they must consider it in that light, exactly what it is.

Mr. Ward: What that court had to say in that case has not been wholly determinative.

442 By Mr. Spratt:

Q. You say that Mullen's signals disappeared from your view each swing in the signals he gave you? Is that true?

A. Either you misunderstood me or I misunderstood you. I understood you when you were asking the question that his light disappeared between signals.

(Question read).

Mr. Spratt: Strike that out, and I will ask him this question.

Q. Did Mullen's signals disappear from your view each swing in the signals he gave you?

The Court: Do you understand that question? If not, read it over.

The Witness: Your Honor, I don't thoroughly understand it.

The Court: Read it over.

The Witness: I was studying whether he meant between the signals——

Q. When he was giving you the signals as you approached dwarf 6 and after up to the time of the accident. Did Mullen's signals disappear from your view each swing in the signals he gave you?

A. Yes, sir.

Q. So that you couldn't see the finish or ending of any signal that Mullen gave you?

A. Yes, sir.

Q. That is, you couldn't see it?

A. I could.

The Court: You could see?

A. Yes, sir.

Q. You could see the end?

443 The Court: His question was, you couldn't see? You say yes to that. You mean that you could see?

A. Your Honor——

The Court: Just make it clear what you mean in answer to his question.

A. I can't without an explanation.

The Court: You may give an explanation that will embody an answer to his question.

A. He asked me if I could see the finish. Now, I understand the signal as two finishes up and down.
Q. The down finish?
A. I didn't see that. I saw the up finish.
Q. But you never saw the down finish of any of Mullen's signals there?
A. I saw——
Q. Just answer that yes or no.
A. I saw his light disappear.
Q. You didn't see the ending of any of his down signals, did you?
A. I can't answer your question, Mr. Spratt.
Q. Could you see how far the light went on the down signal?
A. I couldn't see how far it went by the end of the caboose, no.
Q. Mr. Kinney, you were uncertain of Mullen's signals from the start, were you not?
A. Why your question isn't plain enough so that I can answer it.
The Court: Isn't that plain? Read that question.

(Question read.)

444 A. I don't know where he is starting me from.
Q. From the tower.
Q. Yes, sir, from tower I up——
A. His signals were plain enough to me.
Q. And you were never uncertain about them?
A. Yes.
Q. When were you uncertain about them?
A. When I reversed the engine at the point of the accident.
Q. Right at the point of the accident?
A. Yes.
Q. And never before that? You weren't uncertain at all before that as to what Mullen's signals were?
A. Mullen's signals——
The Court: Yes or no. Were you uncertain?
A. No, sir, I was not.
Q. Now, didn't you testify on the first trial (page 89) that you were uncertain because Mullen wasn't attending to his business, because you did not think Mullen was attending to his business?
A. I don't remember giving that testimony.
Q. Now, I will refresh your recollection (page 89): "Q. Before you stopped at Hertel avenue you observed that the brakeman didn't seem to be attending to his business?
A. Yes, sir.
Q. So that you called out to the fireman to take observations regardless of the brakeman?
A. Yes, sir.
445 Q. And you did that because you thought the brakeman wasn't doing his duty on the forward part of the caboose?
A. Yes, sir."
Did you testify to that?
A. Yes, sir.
Q. That is true, isn't it?

A. Yes, sir.

Q. So that you did have doubt about Mullen doing his duty at the time you stopped at Hertel avenue?

A. In one particular point.

Q. And then again at the last point you had doubt?

A. At the point of the accident.

Q. So that there were two places you had doubt about his doing his duty?

A. Yes, sir.

Q. So that you called Sowers over to look at the signal, did you? Was that the reason you called Sowers over to look at the signal with you?

A. I didn't call him over.

Q. Well, you called to the fireman to take observations regardless of the brakeman, did you not?

A. I can't answer your question.

Q. Didn't you testify this: "Q. And before you stopped at Hertel avenue you observed that the brakeman didn't seem to be attending to his business?

A. Yes, sir."?

A. Yes, sir.

Q. (Continuing reading:) "Q. So that you called out to
446 the fireman to take observations regardless of the brakeman?

A. Yes, sir.

Q. And you did that because you thought the brakeman wasn't doing his duty on the forward part of the caboose?

A. Yes."

You testified to that, did you not?

A. Yes, sir.

Q. So that you did ask Sowers, the fireman, to take observations of the signals, didn't you?

A. No, sir, I didn't ask him to take observations.

Q. What did you ask him to take observations of?

A. Of Hertel avenue from the left side of the track.

Q. From Hertel avenue to the left side of the track?

A. From——

Q. What was there that the brakeman was failing to do at that time?

A. Why, he didn't continue—he didn't give me a customary signal that Hertel avenue was all clear from people crossing over.

Q. What was the customary signal that Hertel avenue was all clear?

A. Why, it would be a come ahead signal.

Q. He had given you the come ahead signal you have testified to at tower I to come ahead?

A. Yes, sir.

Q. And that was a slow come ahead signal?

A. Yes, sir.

447 Q. If there was anything on Hertel avenue then you would expect that he would stop you?

A. I expected if there wasn't anything on Hertel avenue to receive another signal.

Q. If there was anything on Hertel avenue you would expect a stop signal, would you not?

A. Yes, sir.

Q. And if there wasn't anything on Hertel avenue after you got your notice to come ahead you would have proceeded until you got a different signal, would you not?

A. Well, I didn't.

Q. You didn't proceed ahead?

A. I reduced speed, and the brakeman then stuck his light out and give me a signal.

Q. Didn't you testify here that you went at a uniform speed of from 6 to 7 miles an hour from the time you started at tower I until the time of the accident? Haven't you testified to that several times?

A. Yes, sir.

Q. There was no obstruction on Hertel avenue, was there? You didn't have to stop for any one on Hertel avenue?

A. No.

Q. You went right along?

A. Yes, sir.

Q. From the fact that Mullen didn't give you the proper signal at Hertel avenue caused you to be suspicious of him that he wasn't performing his full duty, did it not?

A. I can't answer your question, Mr. Spratt.

Q. From the fact that he didn't give the signal that you
448 claim he should have given then, he didn't perform his duty? Is that right?

A. I don't know how to answer your question, I am sure.

Q. You don't know how to answer it?

A. No.

Q. If he was obliged to give you a signal before you reached Hertel avenue, and didn't do so, he was negligent then, wasn't he?

A. I can't answer your question because I don't know of any rule that would require him to give a signal or not to.

Q. Or not to? And yet didn't you tell the jury just a moment ago that it was his duty to give you a signal before you crossed Hertel avenue that it was all right for you to cross Hertel avenue?

A. I meant that I thought it would be his duty.

Q. You considered it was his duty?

A. Yes, sir.

Q. And feeling that he wasn't and knowing that he wasn't doing his duty then you asked the fireman to make the observation, did you not?

A. Not the observation.

Q. I say, you did ask the fireman to make an observation?

A. I have testified on the trials that I asked the fireman to look out on the left side of the engine for street cars.

Q. You asked him to make some observations, did you not?

A. Yes, sir.

Q. Now, after that you tried to see the dwarf, did you not, on that account yourself?

449 A. After what?

Q. On acount of the brakeman Mullen failing to give you the signal which you thought he ought to have given you at Hertel avenue did you try to see the dwarf yourself?

A. As I remember it I saw the dwarf before——

Q. I say, did you try to see the dwarf on that account yourself, make close observations yourself?

A. As I remember it, it was right after I asked the fireman to look——

Mr. Spratt: I ask that that be stricken out, and ask for an answer to the question.

The Court: What is the question?

Mr. Ward: His question involves a mental operation which can't be answered by yes or no.

Mr. Spratt: Well, I will withdraw the question then. I will not take any time.

Q. When you claim you did see the dwarf, and that it was then green, the steam was interfering with you seeing it, wasn't it, at least to some extent?

A. There might have been steam blowing up in front of me.

Q. I ask you, didn't the steam to some extent interfere with you seeing the dwarf at the time you claim you did see it?

A. I would like to answer your question, but I don't see how I can.

Q. Well, then, I will refresh your recollection——

Mr. Ward: You are not obliged to answer those question yes or no. If you have an answer you are at liberty to give it un-

450 less the court otherwise directs you.

Mr. Spratt: I think——

The Court: I have instructed the witness and have instructed him — several of them here as to the rule on cross examination. You are not obliged to answer yes or no. You can say "I don't know," "I don't remember," or "I can't answer."

Mr. Spratt: I think it is the duty of the court to lay those rules down and not for counsel.

The Court: Oh, yes, that is the duty of the court.

Mr. Ward: It seemed to me that Mr. Kinney had an erroneous impression that he had to give a categorical answer when an explanation would be the natural answer.

The Court: The way to get the witness instructed is to call the attention of the court, and not for the lawyers to instruct the witnesses.

Mr. Ward: I didn't mean to offend, your Honor. I beg your pardon.

Q. Was the dwarf entirely clear to you at the time you saw it, at the time you claim it was green?

A. By looking through the steam.

Q. Was it clear to you?
A. Yes, sir.
Q. At the third trial, pages 334 and 335, did you testify: "Q. At that time was there any steam escaping from the engine?"
451 And did you answer, "Yes, sir."?
A. Yes, sir.
Q. (Continuing reading:) "Q. To what extent?
A. Obscured my view from seeing ahead.
Q. At that point did it obscure your view of these dwarfs?
A. Not entirely, no, sir.
Did you testify to that?
A. Yes, sir.
Q. Now, did you also testify, page 334: "Q. What was it?" and did you answer, "It looked green to me?"
A. Yes, sir.
Q. And that was as strong as you put it, wasn't it?
A. I couldn't make it any stronger.
Q. You couldn't? That is right, I guess. That was the only time you tried to see the dwarf, wasn't it?
A. Do you mean as I said there?
Q. Yes.
A. Yes, sir.
Mr. Ward: Did you understand that question, Mr. Kinney?
A. Yes, but he didn't ask me where.
Mr. Ward: He asked you if that was the only time you tried to see the dwarf. Don't you know whether you tried to see the dwarf again or whether you didn't?

Mr. Spratt: It doesn't seem to me that the counsel ought to break in here.
452 Mr. Ward: I am not, but this man is a farmer and you are a smart lawyer.
The Court: You may call the court's attention to the fact that you don't understand it, and have it read to you, giving you plenty of opportunity to consider what the question means, and if necessary ask that it be repeated and amplified.
Mr. Ward: I would like to ask Mr. Kinney if he understands that last question and his answer.
Mr. Spratt: Just read the question and answer.

(Question and answer read.)

The Witness: I would like to have the question modified.
Mr. Spratt: You may modify your answer.
The Court: Then you cannot answer it in that form?
The Witness: No, I can't answer it in that form.
Mr. Ward: Then I ask that the answer be stricken out.
The Court: Strike it out.
Mr. Spratt: Exception.

Q. How many times did you try to see the dwarf from the time you started at the tower I until after you passed the dwarf?

A. Well, Mr. Spratt, I will have to ask you to modify that question.

The Court: You want it made clearer to you? Is that what you mean by modifying it? You can answer the question——

453 The Witness: I can't answer his question yes or no.

The Court: If you can not answer say you can't.

The Witness: I can't.

Q. You claim you saw the dwarf signal once, do you not?

A. Yes, sir.

Q. Did you try to see it after that?

A. Yes, sir.

Q. How many times did you try to see it after that?

A. I can't answer your question intelligently, Mr. Spratt.

Mr. Spratt: It seems he ought to——

The Court: You are asked now how many times you tried to see this dwarf 6 after a certain place.

Mr. Spratt: After he claims to have seen it.

The Court: After you saw it the first time. Or was that the only time? You can answer that.

A. I tried at all times, if that is an answer.

Q. You tried at all times?

A. Yes, sir.

Q. You tried at all times to see it?

A. Yes, that is the engineer's duty.

Q. You had your eye on it all the time looking for it?

A. I had my eyes ahead.

Q. Looking for it? Did you testify on the third trial, page 240:

454 "Q. Did you have an opportunity to do so, to look in that direction as you went along?" and did you answer, "yes, sir"?

"Q. How many times?

A. That I couldn't state, how many times.

Q. More than once?

A. I don't think that I did."

Is that true?

A. Yes, sir.

Q. And was your memory better on the third trial than it is now after this lapse of several years?

A. It might have been. It was closer to the accident than now.

Q. So that you would say what I have read here that you testified on the third trial was correct, would you not?

A. I should say that that was as I testified, yes, sir.

Q. You couldn't see Mullen's body at all after he got on the caboose on account of the darkness, could you?

A. I can't answer your question, Mr. Spratt.

Q. You can't answer it?

A. No.

Q. Did you see his body at all after he got on the caboose?

A. No, I didn't.
Q. All that you saw then after Mullen got on the caboose was the light?
A. Yes, sir.
Q. Could you have seen him in the darkness anyway whether he stood with his back against the caboose or not?
455 A. I can't answer your question.

The Court: What was that question?

(Question read.)

The Court: That is, giving his opinion as to whether he could see him in the dark?
Mr. Spratt: Yes, his judgment.

Q. Did you testify on the fifth trial, page 339, that on account of the darkness you couldn't see Mullen's body at all?
A. Did I testify to that?
Q. Did you testify to that?
A. I might have.
Q. Now, didn't the steam to some extent interfere with your seeing Mullen's signals in going from tower I to where the accident occurred?
A. It might have to some extent.
Q. Didn't it, and didn't you testify that it did on the second trial at pages 154 and 155?
A. I can't answer your question.
Q. You can't answer that?
A. No, sir.
Q. (Reading):
"Q. Now, did the steam interfere with your taking Mullen's signals?
A. To some extent it did."
Is that true?
A. Yes, sir.

Mr. Ward: I would like to have you ask him the next question in connection with that point.
Mr. Spratt: No.
The Court: You can make a note of it and come back to it. Now let him go on with his cross examination.

456 Q. You testified on this trial that you reversed your engine and stopped it because the signal you saw Mullen giving was a faster come ahead signal, and that that alone raised a doubt in your mind? You testified to that did you not?
A. On this trial? Do you mean on this trial?
Q. Yes.
A. Yes, sir.
Q. Now, if you first saw a clear signal light on the dwarf, and then the steam prevented you from seeing it, and you followed Mullen's signals, which you say were come ahead signals, why didn't you

follow Mullen's fast go ahead signal instead of reversing your engine and putting on the emergency?

A. As I understand your question it calls for an explanation.

The Court: You may explain it.

A. As I told you last night before court adjourned—I answered the same question, Mr. Spratt.

Q. Leave that out, what you answered. I don't think you did. We won't dispute that.

Mr. Ward: Counsel has called for an explanation, and I think the witness is entitled to give it.

The Court: Yes, you are entitled to give the explanation.

A. I told you last night that when Mullen's signal became faster at the point of danger that I knew it was contrary to practice to pass over them frogs at a faster rate of speed, and his signal became doubtful to me under rule 106, and that is what brought me to a stop.

457 Q. Now, Mr. Kinney, Mullen's signals up to that time were to come ahead, were they not?

A. Yes, sir.

Q. And you assumed having passed the dwarf you had a clear right to go out on the main tracks, did you not?

A. Assuming——

The Court: Read the question.

(Question read.)

A. Yes, sir.

Q. Then what was the danger of you proceeding fast, and getting across these tracks, and out of the way?

Mr. Spratt: I object to side remarks of the counsel.

The Court: Make your objection to the court, and the court will undertake to rule on it.

Mr. Spratt: These subterfuges of putting the witness on is an old game for Mr. Ward.

Mr. Ward: I am not going to let you fool him any more than I can help.

The Court: I am not going to try the question of games of counsel. I am simply going to try this case according to rules.

Mr. Spratt: That is all I ask.

The Court: If there are any objections to be made they should be made to the court, and the court will pass on the questions, and nothing said in the hearing of the jury except to make objections.

(Question read.)

Mr. Ward: I object to that on the ground that it contains
458 a misstatement of fact. The movement didn't lead the witness across the track, but out onto the track.

The Court: What do you say to that, Mr. Spratt? Is that a misstatement?

Mr. Spratt: I will amend it. It really was across the tracks to get down on the other track. I will say out on the tracks then if the counsel wishes it that way.

The Court: Is that a correct statement?

Mr. Ward: Yes, I think it is now.

The Court: State the question again.

Q. Now, Mr. Kinney, having the signal of Mr. Mullen as you claim to come ahead, and having passed the dwarf which you state when you saw it last was green, you having a right to assume that you had under those conditions a right to go out on the main tracks, what was there to cause you any suspicion because Mullen asked you to hasten on quickly, to go on quicker than you were before? How did that raise any suspicion in your mind?

The Court: You may explain now fully what happened in your mind.

A. Because there is special instructions issued to the engineers, and put on what we call bulletin boards.

Q. What is that special instruction?

A. And you asked me what caused a suspicion. I didn't know whether Mr. Mullen had saw it or not, but there is a speed rate over interlocking switches, and when he was giving me a signal to come faster at a point on the road where the speed ought not to be
459 increased is what raised my suspicion that he wasn't acquainted with the rule.

Q. What is the rule with reference to crossing switches at the speed that you have said?

A. We have never been able to get ahold of it.

Q. You have never been able to get ahold of that?

A. No, sir.

Q. And yet you claim there was a rule of that kind?

A. Yes, sir.

Q. And the book of rules is supposed to contain all the rules that you operate under.

A. The book of rules says there will be special instructions issued from time to time as the case requires it, and these special instructions are issued by the superintendent, and placed on the bulletin board in the register room for the engineers and firemen.

Q. To your knowledge how long had that switch and interlocking apparatus been there before this accident?

A. I couldn't tell you. I made no memorandum of it.

Q. How many years?

A. I think it had been there all the time that I was an engineer, if not longer.

Q. That was how many years?

A. Eight years.

Q. It was long enough to have the rule put in the book if there was any such rule, wasn't it?

A. There are special instructions that are never put in the book. Sometimes they are cancelled before they cancel the book of rules.

460 Q. And you can't produce it or tell the jury here where there is any such rule?

A. As I say, I have never been able to get hold of it. It might be the special——

Q. You were running 6 or 7 miles an hour you claim at that point?

A. Yes. I couldn't specify whether it was 6 or 7 or 7 or 8.

Q. Or 5 or 6, do you? You don't know but what it might have been 5?

A. I don't think it was as low as 5.

Q. You testified on one of the trials that you were going along there from 5 to 6 miles an hour, didn't you?

A. I might have.

Q. Did you have a time table at that time?

A. Yes, sir.

Q. You knew a Michigan Central train was due about that time?

A. Yes, sir.

Q. You knew the New York Central train was due about that time?

A. Yes, sir.

Q. And I think you knew—that is, you claim I think that there might be a hurry about getting out and down the tracks?

The Court: There might be what?

Mr. Spratt: They might be anxious to get him out on the tracks and clear of these two trains.

Q. I think you testified to that somewhere, did you not?

A. I can't answer your question.

461 Q. Now, you did testify, did you not, on one of the trials that the reason you stopped just before the accident was that you got a stop signal from Mullen?

A. I might have.

Q. And was that true, if you did?

A. Yes, under the explanation I have given here.

Q. And the explanation is in one instance it was a fast come ahead signal, and the other explanation you just referred to was a stop signal by Mullen? Is that right?

A. I can't follow your question.

Q. In one trial you testified that you got a stop signal from Mullen, did you not, just before the accident?

A. Yes, sir.

Q. And in this trial you testified that you got a fast come ahead signal from Mullen just before the accident, did you not?

A. Yes, sir.

Q. The book of rules that has been introduced here in evidence showing how the signals should be given, and so forth, you were given a copy of those rules by the New York Central, were you not?

A. Yes, sir.

Q. And you had a copy of those rules in your possession either at your home, or carried them with you, did you, on the road at the time?

A. Yes, sir.

Q. And these books of rules are given to all employees, are they not, who operate on the road?

A. Yes, sir.

462 Q. And you also had a time table at that time?

A. Yes, sir.

Q. Of the movements on that part of the New York Central road where you were operating?

A. Yes, sir.

Q. Including the main tracks that you were going out on? That is true, isn't it?

A. Yes, sir.

Q. Now, Mr. Kinney, the New York Central paid Dr. Marcy, did they not, for the services he rendered you?

A. I don't know.

Q. Dr. Marcy never made any claim against you for services, did he?

A. No.

Q. And the hospital bill, no claims ever made against you for it, was there? The New York Central paid that, did it not?

A. I don't think so.

Q. Did you ever pay it?

A. I think the Engineers Brotherhood paid it.

Q. Are you certain of that?

A. Either paid the whole or a portion of it. They ordered a change in the treatment.

Q. Are you sure the New York Central didn't pay all or part of it?

A. I can't answer your question.

Mr. Spratt: That is all.

Redirect examination.

By Mr. Ward:

Q. Just a couple of questions, John. Mr. Spratt asked you this morning two or three things about previous testimony. I
463 suppose you have been on the witness stand for a whole day every time this case has been tried, haven't you?

A. This is a fair sample of it, I should say.

Q. And were you examined first by Mr. Rourke?

A. Yes.

Q. Then by Mr. Hollister?

A. Yes.

Q. Now by Mr. Spratt?

A. Yes.

Q. Have you ever read over the testimony that you gave on any previous trial?

A. I can't recall that I have.

Q. Now, Mr. Spratt went back to a trial that occurred nine years ago, and asked you about testimony that you gave on page 99 relative to some lack of attention on the part of your head end brakeman before approaching Hertel avenue. Will you please explain to the jury what that lack of attention referred to, that particular lack of attention? What were you expecting from him and what you didn't get.

A. When I left tower I have I received a come ahead signal, and it was customary in approaching Hertel avenue that he would shut his light out and let you know it was all clear.

Q. That is, you mean by that to give you another proceed signal?

A. Yes, sir. And so there might be a misunderstanding between Mr. Boyle and I, I might have expected——

Q. Between whom?

A. Mr. Mullen and I. I might have expected his signal sooner than he thought there was any need of giving it, when I
404 asked the fireman to look out here on the left-hand side and look for street cars.

Q. Was that the only lack of duty that you observed on the part of that brakeman that day?

A. Yes, sir.

Q. After passing——

A. Just——

Q. Except at that last minute?

A. I want an explanation.

Q. Go ahead. You understand this better than all of us do put together.

A. Leaving tower I have to block station 55 I didn't reduce my speed so that I could say that I reduced it. When I didn't get the signal from Mullen at the point I thought I ought to I simply shut the steam off. That would leave the weight of the engine pulling from the caboose, take out the slack, probably give Mullen an idea that I was looking for a signal, and he shut his light out and give me a signal to proceed.

Q. And did he do that?

A. Yes, sir.

Q. Did you get that before you got to Hertel avenue or afterwards?

A. I got the signal I don't believe over two or three seconds after I shut the steam off from the engine. He shut his light out and gave me the signal.

Q. Is that a kind of hint that you were looking for a signal? Is that what that is done for?

A. Yes, sir.

Mr. Spratt: I object to it.

Q. Mr. Spratt asked you about some testimony you gave
405 on the second trial eight years ago, page 410. Mr. Spratt read some of your evidence to you at folio 410 on the second trial from the printed record, and he asked you:

"Q. Now, did the steam interfere with your taking Mullen's signal?' And you read Mr. Mr. Kinney's answer, "To some extent it did."

Now I call his attention to the whole testimony on the subject given at that point. Did you then testify, and being then under cross examination by the railroad lawyer:

"Q. When did it begin to interfere, when you first started from Hertel avenue?
A. It was when I begun to make the grade there.
Q. The grade from Hertel avenue to the dwarf?
A. Yes, sir.
Q. So that you had some difficulty in taking Mullen's signal from Hertel avenue down, did you or did you not?
A. No.
Q. You had no difficulty in taking his signal?
A. No.
Q. At no point?
A. Not that I can remember of.
Q. So that so far as the steam was concerned while it obscured the dwarf nevertheless the brakeman's signals could be observed by you?
A. Yes, sir."

Is that your testimony?
A. Yes, sir.

Q. Mr. Spratt called your attention to your testimony on
466 some previous trial on which you said that at the moment you reversed your engine you got a stop signal.

Mr. Ward: What part of the evidence were you referring to then, Mr. Spratt? You went into that yesterday when you had the evidence, and Mr. Kinney made an explanation.
Mr. Spratt: I will try to find it for you.

Q. You understand what I am referring to, don't you, Mr. Kinney?
A. Did you ask me a question before that? I would like to have the question read.
Q. On this trial you testified that you had a signal which caused you to stop, but which seemed to be a fast proceed signal. Have you any explanation to make of that?
A. Why, yes, why I said it was a stop signal, it come in under the rule 106.
Q. And that rule makes a stop signal of what?
A. Of any kind of a signal. Any kind of a signal that puts the man who has to read the signal in doubt is a stop signal.

Mr. Ward: You made that explanation yesterday. I didn't know but what we had all overlooked that. That is all.

Recross-examination.

By Mr. Spratt:

Q. If Mullen's signal was clear, and the dwarf signal was clear, what danger was there in going out on the main track?

Mr. Ward: The counsel has gone all over this.

The Court: I am not going to allow a reopening of the
467 cross examination. He may answer that question.

A. I don't know of any danger.

Q. I think one other thing brought out here that I hadn't—you say that you shut off your steam when you were proceeding from tower I to the dwarf?

A. I said I shut it off for a short space of time, very short space.

Q. Where was your engine at that time you shut it off?

A. Between Military road and Hertel avenue.

Q. Was that the point where you saw the signal green?

A. No.

Q. Why did you shut off your steam?

A. Well, I have just explained it here this morning why I shut off several times.

The Court: Tell us again.

Mr. Spratt: That is the first time I ever heard you shut it off.

Q. Why did you shut off your steam?

A. To give Mr. Mullen a hint that I was looking for a signal.

Q. So that Mullen in your opinion was not diligent in performing his duty at that point, was he?

A. That is quite technical.

Q. I say, in your opinion then you didn't think he was diligent in performing his duty, and you stopped your engine and called his attention to it? Is that right?

A. I didn't have any opinion then on that subject.

468 Q. Why then did you stop your engine?

A. I didn't stop the engine.

Q. Why did you shut off the steam?

A. Because I was looking for a signal.

Q. And a signal that you ought to have got at that point from Mullen?

A. At that particular point.

Q. At that particular point you consider you ought to have got a signal from Mullen? Is that right?

A. That or half a car length or a car length further along.

Q. Why didn't you run a half a car length or a car length further along and see whether you wouldn't get the signal or not before shutting off your steam?

A. Well, you have asked me a question that I can't answer.

Q. You can't answer that?

A. No.

Q. And then you stopped your engine without any reason at all?
A. Why I can't answer that question.
Q. You can't give me any reason then for shutting off your steam?
A. You are asking me something that I didn't do.
Q. What is that?
A. I have already stated I didn't stop my engine.
Q. Shut off the steam?

Mr. Ward: Hasn't he answered this question a half a dozen times?
469 The Court: He told why he shut off the steam. It was to give a hint to Mullen, he said. I have heard him say it two or three times.
The Witness: May I explain to your Honor——
The Court: You are under cross examination.

Q. The reason why you gave a hint to Mullen was that you didn't consider he was performing his duty at that point, wasn't it?
A. I couldn't answer that question Mr. Spratt.
Q. Mr. Kinney, have you been a witness for Mr. Ward in other cases?
A. It seems to me I was on one of two occasions.
Q. Haven't you advised him in many cases as to railroad regulations and all that sort of thing?
A. Why, I think he is a capable man himself.
Q. I am just asking you, haven't you done that, Mr. Kinney?
A. I couldn't answer your question, Mr. Spratt.

Mr. Spratt: That is a question to be answered by yes or no, I think.
The Court: If you have advised Mr. Ward say so. If you haven't——
Mr. Ward: He said "many cases." I suppose that is why Mr. Kinney is in doubt.
Mr. Spratt: Other cases.
The Court: In other railroad cases?
Mr. Spratt: In other railroad cases in which Mr. Ward
470 was an attorney against the railroad.
Juror No. 2: Did he mean in this particular case or in something else?
The Court: This means other cases outside of this case. It means that during the association he has had with Mr. Ward in these last ten years has he advised him about some matters that have come up in other railroad cases. Isn't that it?
Mr. Spratt: Yes.
The Court: You can say whether you have or not.

A. Yes, sir, I have.
Q. So that you have become quite a skillful lawyer, haven't you, a lay lawyer in railroad matters? Isn't that right?
A. You might consider me an expert at it.

Q. Both in the law and in the facts of railroad proceeding? Isn't that right, Mr. Kinney?

A. I don't know whether it is right or not.

Q. When you come on the stand here to testify you have considerable knowledge outside of railroad matters as to the law and procedure in railroad cases, haven't you?

(Witness does not answer.)

By Mr. Ward:

Q. I suppose you got a good deal of your instruction from the cross examination that you have received from these distinguished railroad lawyers on the six trials of your law suits, haven't you?

A. I think I have, more than I have from Mr. Ward.

471 Mr. Ward: That is all.

The Court: The plaintiff rests?

Mr. Ward: The plaintiff rested yesterday.

Mr. Spratt: I will say to Mr. Ward that the fireman Sauer, that was on this engine, and who is working for the New York Central at this time, we produced here at the request of Mr. Ward.

Mr. Ward: I hope you will keep him here long enough to swear him.

Mr. Spratt: If you want to swear him you can swear him. He has been at your office, and you have taken statements from him.

Mr. Ward: That is a false statement. You take the stand and swear to that, if you dare.

Mr. Spratt: I have been informed that you have.

Mr. Ward: You can put your fireman on.

Mr. Spratt: I produced him here. You asked me to produce him in court and I have produced it.

The Court: I hope we can avoid any altercation. I hope to avoid all disputes between the lawyers personally.

Mr. Ward: I hope your Honor will note that I did not invite that, and that Mr. Spratt's voluntary statement was entirely outside of the rules of proper order and procedure in a court room.

Mr. Spratt: Not at all. Mr. Ward asked us to produce
472 this man, and I wanted to just announce that we had produced him before he closed his case.

The Court: The announcement stands that he is here to be sworn if he wants to.

Mr. Ward: Ordinarily you swear your employees, and don't ask anybody else to.

The Court: Now the plaintiff rests as I understand it? No more witnesses to be sworn?

Mr. Ward: Not as a part of our direct.

Mr. Spratt: If the court please, I move for a nonsuit on the ground, first, that the plaintiff has failed to make out any cause of action against the defendant.

Second, on the ground that the plaintiff has failed to establish any negligence on the part of the defendant.

Third, upon the ground that the plaintiff has failed to establish the cause of action set forth in the complaint, or any cause of action, against the defendant.

I also move for a nonsuit on the ground that the plaintiff has failed to make out a cause of action under the Federal Employers' Liability Act, by having failed to prove that the plaintiff was engaged in interstate commerce at the time of the accident; and also on the ground that the plaintiff's testimony itself establishes as a matter of law that he was guilty of contributory negligence in failing not only to observe reasonable care in approaching and passing
473 the dwarf signal, but also in not making sure either of the hand signal of the brakeman, or of the color of the dwarf signal after leaving Hertel avenue; and on the further ground, so far as the question of interstate commerce is concerned, that even assuming that such a case had been made out under that statute, that that case was outlawed by the provisions of the statute, inasmuch as the action was not brought under the Federal Statute until 1916, as set forth in our answer.

I also move for a nonsuit on the ground that there is no evidence of actionable negligence on the part of the defendant, and that the plaintiff under the undisputed facts assumed the risk as a matter of law.

The Court: The court will submit the questions of fact to the jury, and deny the motion.

Mr. Spratt: Exception.

WILLIAM M. REITHENBURG, was duly sworn as a witness in behalf of the defendant.

Direct examination.

By Mr. Spratt:

Q. Mr. Reithenburg, where do you live?
A. 34 Gorham street.
Q. Are you a married man?
A. Yes, sir.
474 Q. How much of a family have you got?
A. Four children.
Q. Wife?
A. Yes, sir.
Q. What are you doing now?
A. I am in the employ of the New York Transit Company.
Q. How long have you been in the employ of that company?
A. Since January 4th, 1916.
Q. Were you at one time in the employ of the New York Central?
A. Yes, sir.
Q. What year?
A. I began work for the New York Central September 17th, 1907, and left their service to enter that of the New York Transit Company January 4th, 1916.

Q. And while you worked for the New York Central what were you doing?

A. I was employed as an operator and signal man.

Q. Now, do you remember the accident to Mr. Kinney.

A. Yes, sir.

Q. Were you towerman at tower 55 at that time?

A. Yes, sir.

Q. And how long had you been towerman there before the accident?

A. From September 17th, 1907.

Q. This tower was located on the east side of the Niagara Falls branch of the New York Central and a short distance north of the Y tracks?

475 A. Yes, sir.

Q. Coming from East Buffalo. Now, what kind of a tower do you call that? Was it called an interlocking tower?

A. It contains an interlocking plant.

Q. What does that interlocking plant control?

A. The switches and signals are operated through the interlocking plant.

Q. That is a series of levers, is it?

A. Yes, sir.

Q. I call your attention to the machine in the court-room over to your right (indicating). Is that the interlocking plant that was there at the time?

A. That is the upper part of the machine.

Q. The traffic is controlled through this interlocking plant on both the main tracks and on the northerly end of the Y running to East Buffalo?

A. Yes, sir.

Q. How much territory is controlled by tower 55?

A. On the west-bound main track——

Q. That is, the west-bound main track is the one marked here "West-bound main track" with the arrow pointed towards the north?

A. Yes. On the westbound main track our farthest signal from the tower is placed nearly at tower H.

Q. Here (indicating) is tower H to the south. Is it known as signal No. 1 here (indicating)?

A. Yes, sir.

Q. That is just northerly of the Belt Line Y, so-called, is it not, located just northerly?

476 A. It is located between the Erie Railroad crossing and the New York Central.

Q. And on the easterly side of the New York Central main tracks?

A. Yes, sir.

Q. So that is the most southern boundary of your territory?

A. It is the other end of that block.

Q. Where is the northerly end of your territory?

A. The northerly end would be on the opposite track, what is known as the eastbound track, and it extends much further than the drawing there on the map.

Q. Is there a bridge known as the D. L. & W. bridge?
A. Yes, sir.
Q. Does it extend up to that?
A. Yes, sir. Our fixed signal is No. 15, just on the opposite——
Q. I am going to get to the signals now. I am going to ask you how far up it extends?
A. Up to the Delaware bridge.
Q. And that was, I think we stipulated, about three thousand feet from the tower?
A. Yes, sir.

Mr. Ward: Did you and Mr. Reithenburg stipulate it?
Mr. Spratt: I thought it was stipulated here in the evidence of the last trial.
Mr. Ward: I didn't remember. I was wondering whether you were stipulating with Mr. Reithenburg.
477 Mr. Spratt: If you want it I will prove it now.
Mr. Ward: I will be glad to look at it. If we didn't stipulate it the last time I will do it now.
Mr. Spratt: I think we stipulated it was three thousand feet from the tower up to the D. L. & W. bridge, and my recollection is that it was stipulated it was 1,490 feet from the tower to the signal marked "1."
Mr. Ward: Mr. Wing had all those measurements.
Mr. Spratt: All right.

By Mr. Spratt:

Q. Is that section known as a block?
A. Those sections I speak of, yes.
Q. Your territory was one block?
A. Composed a block.
Q. What was it known as?
A. That was the block for tower 55.
Q. Tell me what controls the movements of the trains from this tower.
A. The signals control the movements of the trains.

The Court: Pardon me, I don't quite understand. Does this signal system also take care of a part of the Y down as far as this No. 6?
Mr. Spratt: Yes, I will call his attention now to the Y.

Q. How much of the Y does your territory include?
478 A. I control that leg of the Y between tower 55 and tower I.
Q. From tower 55 up here (indicating) down to tower I (indicating)?
A. Tower I.

Juror No. 2: Do they have signals—from tower 55 they control all of that Y?
Mr. Spratt: Yes.
Juror No. 2: By that stub?
Mr. Spratt: Yes, sir, by that stub commencing here at tower I the signals control it from tower 55.

The Witness: Do I understand the juror means, do I operate some signal that is placed over in this vicinity?

Juror No. 2: Yes, after you cross over that Y there and get down, you have signals that control from tower 55, is what I was getting at.

The Witness: This is the signal that operates from tower 55, this dwarf 6 here (Indicating), but I have control of this track in here (Indicating).

Juror No. 2: That is what I was getting at.

By Mr. Spratt:

Q. I will start over again, because I ought to have proved about the Y just as the court suggested. You say that the movements of the trains are controlled by signals from the tower?

A. Yes, sir.

Q. And how are the switches controlled? Are they also from the tower?

479 A. They are operated from the tower, yes, sir.

Q. So that in the movement of trains on these tracks including both the main tracks and that part of the Y that you have described, the whole thing is controlled by the switches and the signals?

A. Yes, sir.

Q. Now, what do the signals consist of?

A. The signals on the main line consist of both high signals and the lower type, which is known as the dwarf signals. The same is true on the Y track.

Q. Now, what are the dwarf signals used for?

A. They are used for making movements against the current of traffic.

Q. And they are low?

A. Yes, sir.

Q. About how high from the ground was 6?

A. Why, I should think about three feet?

Q. And the high signals are used governing the movement with the current of traffic on the main track?

A. With the current of traffic. It would not make any difference about the track.

Q. In the daytime what are the signals? Are they arms?

A. The signals in the daytimes are arms. On the dwarf signal it is a short arm.

Q. About how long?

A. Why, about ten inches, and on the high signals they use a board.

Q. At night what kind of a signal do they use on the dwarf?

A. At night they take their indications from a light. The

480 light sets on the spindle on the top of the dwarf, and at the rear end of this arm there is a lens, and that has one or two or three specs, as the occasion may require, and those specs are moved first one and then the other in front of the lamp. The lamp, however, is stationary.

Q. And the specs are moved from——

A. From one position to the other by the towerman in the tower.
Q. These specs give different colored lights, do they?
A. The specs are made of different colored glass.
Q. In dwarf 6 how many kinds of glass were there?
A. Two.
Q. What were they?
A. Purple and green.
Q. What did green indicate?
A. A clear signal.
Q. That is, that the man who got that would have a right to proceed?
A. Yes, sir.
Q. Past that dwarf?
A. Yes, sir.
Q. What was the other?
A. Purple.
Q. What did that indicate?
A. Stop.
Q. And a man who got that was obliged to stop?
A. Yes, sir.
481 Q. And the signals, as to whether they were green or purple, were controlled from the tower?
A. From tower 55.
Q. Take the signals out on the main line. What colors were those?
A. Those were red and green.
Q. What did red indicate?
A. Stop.
Q. And a train crew getting that red signal, it meant they should not pass the tower where that signal was?
A. Yes, sir.
Q. If it was a home signal?
A. If it was a home signal.
Q. If it was a distance signal, what did that indicate?
A. A distance signal would be—I think they had three colors they were using on distance signals, red, green and yellow.

Juror No. 2: What do you mean by the distance signals, out beyond the tower?
Mr. Spratt: The furthest one beyond the tower. I was going to get to that.

Q. On the distance signal what did red signify?
A. Stop.
Q. And what did green signify?
A. A clear block.
Q. And what did yellow signify?
A. Caution.
Q. Now, we take the signals on the main track at this point (Indicating). For instance you take the westbound track—that
482 is, the most easterly track, how many signals were there governed by your tower?
A. There were two signals on the westbound track?

Q. And what were they known as?
A. The home signal and the distance signal.
Q. What is meant by the home signal?
A. That is the signal placed near the switches and controls the movement over them.
Q. That is nearest to the tower?
A. Yes, sir.
Q. And what is the other signal?
A. That is the distance signal.
Q. And what is the purpose of that?
A. It indicates the position of the home or block signal.
Q. As a rule, about how far distant from the home signal is the distance signal?
A. I don't know.
Q. Take in your case, is the home signal indicated on this map by No. 2 (Indicating)?
A. Yes, sir.
Q. That is the home signal?
A. Yes.
Q. And is the distance signal indicated by No. 1?
A. Yes, sir.
Q. And about how far is that distance signal from the home signal?

Mr. Ward: Why don't you have Mr. Wing give you those?
Mr. Wing: The exact figures are 1,475.8 feet from No. 1 to No. 2.
483 Mr. Spratt: Shall we stipulate that?
Mr. Ward: Yes, let us rub that out and make it right. (Putting figures on map.)

Q. Those signals, No. 1 and No. 2, govern the traffic going northerly on the westbound track towards Niagara Falls from Buffalo?
A. Yes, sir.
Q. What is the object of having a distance signal?
A. It is to indicate the position of the home or block signal.
Q. And when it is all right for a train to come along to the home signal what light is displayed at the distance signal?
A. Green light.
Q. If it is not all right for them to come on what light is displayed at the distance signal?
A. On that particular one you would get a yellow light.
Q. Then if they got the green light that would indicate they could come right through at least up as far as the home signal?
A. No, it would indicate they would go right through to the next automatic block.
Q. Supposing there was doubt as to whether you could let them through the home signal, what would — the signal displayed at No. 1?
A. If No. 1 were normal it would be yellow.
Q. And if you wanted to stop them there you would display the red?

A. I don't believe you could stop them down at No. 1 signal.

484 Q. This is the place to stop them, up here at the home signal (indicating)?

A. Yes, sir.

By Mr. Ward:

Q. Then they would come from 1 to 2 prepared to stop, would they?

A. Yes, sir.

Q. If they saw yellow signals there they would come from 1 to 2 prepared to stop?

A. Yes, sir.

By Mr. Spratt:

Q. How about the track south of No. 1 towards Black Rock, whether it is straight or not?

A. About straight.

Q. State whether this distance signal No. 1 would be in view of an engineer for a considerable distance south?

A. I should think so.

Q. Now, that takes care of the westbound signals, doesn't it?

A. What?

Q. What you have described here takes care of the signals on the westbound track?

A. Yes, sir.

Q. Now, we will take the eastbound track. What signals control the eastbound main track, that is, the trains going in this direction? (Indicating.)

A. The man coming from Tonawanda would get at the tower signals 15 and 13.

Q. That is 15 there (indicating)?

A. That is the home signal.

485 Juror No. 2: I don't understand what you mean by that. Does your block show No. 15 somewhere?

The Witness: May I make an explanation?

The Court: Certainly.

The Witness: The numbers of these various switches and signals are taken from the numbers of the lever on the interlocking machine. There are no numbers on the switches or the signals.

Juror No. 2: You mean those levers there are all numbered?

The Witness: They are numbered beginning to the left, 1, 2, 3, to 16, and these figures here (Indicating) show the connection between the track or the signal and the machine.

Juror No. 2: That is, if you wanted to make a shift for 15, you would pull lever 15?

A. That is correct.

By Mr. Spratt:

Q. And you have No. 15 here (indicating), and that is the home signal?

A. Yes, sir.

Q. For the eastbound track?

A. Eastbound main track.

Q. What is 14?

A. 14 is the home signal for the eastbound Y track.

Q. Running down here (indicating), if you wanted to put a train in here (Indicating)?

486 A. Going towards tower I.

Q. And what is 13?

A. 13 is the block signal.

Q. That is for the whole block, indicating——

A. That indicates that there is no train between the home signal at tower H and signal 13. This stretch in here (Indicating) is an absolute block, only one train in at a time.

Q. What is the distance signal for this?

A. The distance signal for No. 15 home signal is out on the Delaware bridge.

Q. That is about, I think, 3,000 feet? Was that what was stipulated?

A. Why, I believe that is the distance.

Q. About 3,000 feet north of the tower?

A. About that.

Q. And the D., L & W. bridge crosses the New York Central, doesn't it, at that point?

A. Yes, sir.

Q. And this signal, this distance signal is on that bridge?

A. Yes, sir.

Q. And how is the track from tower 55 north?

A. About straight.

Q. To Tonawanda, to the vicinity, the outskirts of Tonawanda?

A. Yes, sir.

Q. How far is it to Tonawanda?

A. Five miles.

Q. And what is the tower at Tonawanda known as?

A. No. 57.

487 Q. Now, are the lights on these different signals that you have spoke of here the same as you have already described?

A. Yes, sir.

Q. That is, they use the red and green and the yellow?

A. Yes, sir.

Q. And the movements are all governed from tower 55?

A. Yes, sir.

Q. Do these numbers here on the map, Exhibit 1, that you have just referred to, correspond with the number of the levers on the machine that operates them?

A. Yes, sir.

Q. Does that complete the signals? Is there anything you wish to add?

A. Nothing.

Q. The next thing that we come to, that I want to call attention to, are the switches. Now, you have here the switches running on the Y towards East Buffalo, or from your tower down to tower 7, and you also have switches on the main track, do you not?

A. Yes, sir.

Q. Now, how are those switches operated?

A. The switch points are connected to the interlocking machine by a pipe line, and the same is true of the locking bars.

Q. Now, you take the switches here. We will take first the westbound track. They are numbered—the switch is No. 10?

A. Yes, sir.

488 Q. That corresponds to the lever 10?

A. Yes, sir.

Q. Which controls that?

A. Yes, sir.

Q. Then is there a lock on that switch?

A. Yes, sir.

Q. What is that lock for?

A. To lock the switch in either position.

Q. So that when the switch is set properly then it is locked is it?

A. Yes, sir.

Q. That is done by a lever?

A. No. 11.

Q. Now, we take the eastbound switch——

Juror No. 2: Just a minute. You spoke about it being a pipe? What are those for? Do they carry the wires back and forth? I didn't catch what you meant by the pipes?

A. The pipes move the rail from one side to the other. The rail has to be moved—for instance, for a movement going into the Y from Niagara Falls or from Tonawanda to East Buffalo you would have to move the rails of the Y track in a westerly direction, so as to divert the flange of the wheel.

By Mr. Spratt:

Q. The connection between the switch points and the tower?

A. And the machine are made by pipe.

Q. How are the connections made between the signals and the tower?

A. Some of them are made by pipe, some by lines, composed of chains and wires.

489 Q. Do these connections move the switch? Is it a sort of an endless chain?

A. The chains are not used on the switches.

Q. On the signals?

A. On the signals. It is a line built on the principle of an endless chain.

Q. And on the switches on what principle is it built?

A. It is a single pipe line.

Q. I was going to the eastbound track now. The switches are controlled by switch No. 6?

A. Yes, sir.

Q. And by lock No. 9?

A. Yes, sir.

Q. Those switches control the movement from the main track to onto the Y?

A. Yes, sir.

Q. Is there a plant there known as the Keen Melting Company?

A. Yes, sir.

Q. Do they get out on the New York Central tracks there somewhere?

A. Yes, sir.

Q. Does this show on the map up here where they get out (indicating)?

A. Yes, sir.

Q. That is the extreme northerly end of the map?

A. Yes, sir.

Q. Is the movement in and out of that track governed also from your tower?

890 A. We have control of the switch from the tower.

Q. In what way?

A. Through an electric lock.

Q. And that is governed by signals, isn't it?

A. By bell signals.

Q. Now, Mr. Easthamburg, you say you had been at this tower working there from September, 1901?

A. Yes, sir.

Q. And so had moved those switches and those lights I presume, a great many times?

A. Yes, sir.

Q. What is the normal position of those signals?

A. Danger.

Q. At danger? That is, on the main line they show red in their normal position?

A. At night, yes, sir.

Q. I think we will confine it to night, because we are not going to talk about the other signals, because it is merely the night signal. At night the signals are normally at danger or red?

A. Yes, sir.

Q. On the main line? And how is it on this Y at night?

A. The signals with the current of traffic would be red, and all dwarf signals are purple.

Q. Are all dwarf signals purple except when you actually use them?

A. Yes.

Jurors No. 2: That is at danger?

A. That is danger.

891 Q. As I say, you say that the dwarfs are used when you are running against the current of traffic?

A. Yes, sir.

Q. How are the switches when the interlocking is at normal in your block there?

A. They are set for the east and westbound main tracks.

Juror No. 3: That is, on the main line?

Mr. Spratt: That is on the main line. They are normally set for traffic on the main line.

Q. And they are changed only when you want to make a movement on the Y?

A. Yes, sir.

Q. What time did you come on duty on the night in question?

A. Four o'clock in the afternoon.

Q. Your trick was from four o'clock until what hour?

A. From four p. m. until twelve o'clock midnight.

Q. When you came on duty what did you find the signals to be with reference to the switch on the Y? How were the signals set with reference to dwarf 6?

A. They were normal.

Q. Then what would the light on dwarf 6 indicate?

A. The indication should be purple.

Q. And that would be danger?

A. Danger.

Q. With that light at purple would any engine coming
492 along that track against the current of traffic be compelled to stop there?

A. That would be the instructions to him, to stop.

Q. This accident happened about what time?

A. About 8.40.

Q. And from the time that you got on there at four o'clock until this accident happened had the signal at dwarf 6 been changed?

Mr. Ward. I object to that, because he doesn't know.

Q. Had you changed the signal?

Mr. Ward: Yes, that is different.

A. No, I had not.

Q. Had there been any movement on that track out on the main track?

A. Not in that direction.

Q. Now, before the accident happened, will you detail what the first movement was on the eastbound track previous to the accident, telling what signals you got, and what you did?

A. I received an announcement——

Mr. Ward: For the purposes of objecting, I would like to ask Mr. Spratt whether he purposes to show the position of the signals and switches on the main line track, with a view of urging that they are some proof as to the position of the signals on the Y track?

Mr. Spratt: Yes. Before I ask him that question, in answer to

your suggestion I will withdraw that, and I will ask him this question:

493 Q. This was an interlocking device?
A. Yes, sir.

Q. Assuming the interlocking plant and its connections were in good condition, if you had a green signal there at dwarf 6, and the switches set for dwarf 6 in accordance with that signal, what effect would it have on operating the levers on either of the main tracks so as to give another train the right to pass over it?

A. If you had dwarf 6 at clear the signals on the east and west-bound tracks would be at danger.

Juror No. 2: That is, on the main line?

A. Yes, sir.

Q. Could you change that, and if so, how could you change them on the main line?

Mr. Ward: All these questions assume that things were working right?

Mr. Spratt: Yes.

A. If you wanted to make a movement on the main line it would be necessary to first put your signal on the Y at danger, and then straighten up your main tracks, and then you would be able to get your signal?

Q. How did the interlocking plant work that night before the accident?

A. I hadn't had any trouble.

Q. Was it in good condition?

A. It seemed to be working all right.

Q. Now, I think my other question when we started out was that before the accident you testified that the signal on the dwarf was purple or at danger?

494 Mr. Ward: No, he hasn't. He testified what his lever showed.

Q. What did your lever show?

A. Yes, sir, I said that the indication of my lever was that the signal there was at danger.

Q. That is, from your tower the light shone the other day? Could you see the face of it?

A. No, I couldn't.

Q. How were your switches at that time?

A. Normal.

Q. By normal you mean they were set for the main tracks?

A. Yes, sir.

Q. Now, a short time before this accident happened did you receive a signal that there was a train approaching?

A. Yes, sir.

Q. Where did that signal come from?

A. Tower 57.

Q. Tower 57 is located at Tonawanda?

A. Yes, sir.
Q. And how far from your tower?
A. About five miles.
Q. What was that signal?
A. It was an announcement, four bells.
Q. What did that indicate to you?
A. That a train had entered the block between tower 57 and tower 55 on a clear signal.
Q. Was there a New York Central passenger train due about that time eastbound?
A. Yes, sir.

Mr. Ward: Will you ask him at that point whether he could
495 tell from that indication alone, that four bells, what kind of a train it was?

Q. Could you tell from the four bells just what kind of a train it was?
A. Yes, sir.
Q. How would you know that?
A. The four bells—four short bells—indicated a passenger train. If the train desired to go around the Y then the operator at tower 57 held the plunger, causing the last bell of the four to ring for a longer period at tower 55.
Q. Were there any freight trains that passed over there and didn't go on the Y?
A. None that I remember.
Q. So that the four bells given in the way in which you have described indicated to you that it was a passenger train approaching?
A. Yes, sir.
Q. And according to the time table was there a passenger due?
A. Yes, sir.
Q. About that time?
A. Yes, sir.
Q. Then tell the jury what you did after you got this signal that the train had entered the block at Tonawanda?
A. I rang three bells to tower H.
Q. That is down here (indicating).
A. Yes, sir.
Q. What did that indicate?
A. That indicated to him that I had a train in the block going to his block station. I then made a note of it on my train sheet and prepared my signals for the movement.
496 Q. Just tell the jury what you did in preparing your signals for the movement?
A. I pulled in signal No. 15 and signal No. 13.
Q. What was the effect of pulling in those two signals?
A. By reversing the lever it brought the signals to clear. That is, No. 15 immediately came to clear, and No. 13 would clear shortly after. It was cleared through an electric arrangement.
Q. And by clear you mean they went to green?
A. Yes, sir.

Q. And what effect did that have on this distance signal up at the bridge?

A. After 15 and 13 had cleared up then the distance signal on the Delaware bridge would come to clear.

Juror No. 2: Then that would give that passenger train coming that way the full right to go right by your block, would it?

A. That gave him a right to move up to the home signal at tower H.

Juror No. 2: That would carry him past this place where you are speaking of this accident, would it not?

A. Yes, sir.

By Mr. Spratt:

Q. Then you had that eastbound track set for that eastbound train?

A. Yes, sir.

Q. And cleared for it?

A. Yes, sir.

Q. Then what next happened in your tower?

497 A. I next received a request for a movement against the current of traffic from tower I.

Q. That is down here (indicating)?

A. Yes, sir.

Q. And what did you answer?

A. I answered 5, 3, 2, which indicated to him that it was all right to make the movement.

Q. And that entitled him to come how far?

A. To dwarf 6.

Q. Up to dwarf 6?

A. Yes, sir.

Q. That was as you say—your indication was set at danger?

A. Yes, sir.

Q. Then after that what happened?

A. I next received bells asking for an unlocking of the westbound track for train No. 3.

Q. Where did that request come from?

A. Tower H.

Q. Down here (indicating)?

A. Yes, sir.

Q. And train No. 3 was a Michigan Central passenger train?

A. Yes, sir.

Q. Due to pass about that time?

A. Yes, sir.

Q. After you got that signal what did you do?

A. I prepared my westbound track.

Q. Just tell the jury how you prepared it.

A. I believe I had already put the switch engine which was working out at Kam's into clear.

Q. That is, working here (indicating)?

A. Yes, they had got into clear, and I had taken the block away from them.

498 Q. That is up here (indicating)?

A. Yes. So that they couldn't get out on the main track. And then I cleared signals 2 and 1.

Q. 2——

A. Is the home signal.

Q. And 1 is the distance signal?

A. Yes, sir.

Q. By clearing you mean you displayed a green light at each place?

A. Yes, sir.

Q. What occurred after that?

A. Probably three minutes later I heard the buzzer which indicated to me the approach of train 446, which was coming from Tonawanda, and I announced that to tower H. And the next move, I believe, was the announcement from tower H, for No. 3.

Q. Of the approach of No. 3?

A. Yes. After making a note on my sheet of the announcement of No. 3 I stepped to the door of the tower, which faced Hertel avenue.

Q. Faced in a southerly direction?

A. Yes. And looked in the direction of Hertel avenue. Shortly after I saw a caboose come from behind the Kam malt house toward dwarf 6.

Q. It had passed Hertel avenue at that time?

A. Oh, yes. And No. 3 coming in the direction from Hertel avenue, coming toward me. After the caboose got into my sight——

Juror No. 2: That was before he got to this dwarf?

A. Yes, sir.

499 Q. About how far from this dwarf was he?

A. Well, I couldn't just say in feet. The malt house obscures my view.

Q. This is the malt house here (indicating)?

A. Yes. (Continuing:) Of the track down as far as Hertel avenue. It was somewhere, I should judge, about halfway between Hertel avenue and the dwarf signal when he first came into view, and he proceeded along with what I supposed to be about the same rate of speed up to and beyond the dwarf. Of course I naturally expected when he would reach the dwarf signal that he would stop. There was nothing unusual about his movement up to that point.

Q. Did he have a right to come up to that point?

A. Yes, sir. But instead of stopping there, as I had expected, why, he continued on, and almost the next instant, why, the two engines were together.

Q. As that caboose moved along up there, and he came into your view, did you see anyone on the end of it?

A. No, I did not, but I saw a light on the end of it.

Q. It was dark, was it?

A. Yes, sir, it was 8.40 at night.

Q. In October? And *what* did you see this light—was this light giving a signal?

A. Yes.

Q. And what signal was it giving when you first saw it?

A. It was giving a stop signal.

500 Juror No. 2: Now, just a minute. Was this stop signal—the man who was giving it—could you see the whole of that signal?

A. Yes, sir.

Juror No. 2: From the position that you were in?

A. I was up here in the door of the tower, which faced where the lamp was. This man was coming in this direction (indicating) on this upper track. There was nothing between him and I.

By Mr. Spratt:

Q. Will you describe what a stop signal is?

A. It is a signal swung crosswise of the track.

Q. Was he giving that signal?

A. Yes, sir.

Q. Did he continue to give it as the caboose went along?

A. He continued to give it up to a point pretty close to the time of the collision.

Q. You said you came out to the door there? Do you have any duties as towerman to perform with reference to observing trains as they pass?

A. All trains must be observed to see that they carry the proper signals.

Q. That is, the headlights and the tail lights?

A. Tail lights, markers.

Q. And if they don't, do you report them to the next tower?

A. Report them to the dispatcher immediately.

Q. Was that why you were at the door watching this Michigan Central?

501 A. Yes, sir.

Q. Now, when the collision came what did you do?

A. As soon as they got together I remembered the train coming from Tonawanda—in fact, I could hear the buzzer operating. I ran across to the right-hand side of the tower, and raised the window with one hand while I picked up my red light with the other, and shoved it out the window in an effort to warn 446.

Q. That was this New York Central train that was coming from Tonawanda?

A. Yes, sir.

Q. And she was in sight, was she, at that time?

A. She was very close by.

Q. Did you notice what became of the caboose that was being pushed up here past dwarf 6?

A. Yes, sir.

Q. What became of that?

A. Immediately after the engines came together the caboose passed by to the right of the tower; that is, in the direction of North Tonawanda.

Q. Now, on this track that the caboose was running on, how was it taken across the westbound? Was that a solid frog there?

A. Yes, sir.

Juror No. 2: Excuse me just a minute, your Honor. Now, I don't see how that caboose got by, and the two engines collided together. The caboose would be——

Juror No. 9: The caboose was ahead of the engine.

502 Mr. Spratt: The caboose was ahead of the engine, and it pushed out on this westbound track.

Juror No. 2: I see.

Mr. Spratt: And the engines when they came together, of course they came together, and the caboose broke loose and was pushed on.

Juror No. 9: If those switches were set against the caboose how would it get on the track?

Mr. Spratt: First we will show that this was a frog which was solid, and we will show that it forced the switch point afterwards by other witnesses, that these switch points were forced by the wheels of this caboose as it was pushed over and onto the other track.

Mr. Ward: You must have some new witnesses.

The Court: Proceed.

By Mr. Spratt:

Q. This frog is solid here, is it? (indicating).

A. The frog between the eastbound Y track and the westbound main track is rigid.

Q. Then when you get over here (indicating), how was the switch there, to take it on the eastbound?

A. The eastbound Y switch is a split rail switch.

Q. And where was the caboose finally pushed?

A. It went up in the direction of the eastbound main track until it came in collision with 446.

503 Q. This train 446?

A. Yes. Somewhere north of the tower, and later 446 came down with the caboose on its pilot, and piled the caboose up on No. 3's overturned engine.

Q. When these engines met were they both tipped over?

A. Yes, sir.

Q. And where was the engine that Mr. Kinney was on tipped to?

A. It was tipped in the direction of the west bound Y track.

Q. And landed in between the two Y tracks?

A. Well, I don't know just where it lay. I didn't make any examination of it.

Q. Where did the engine of the Michigan Central lay?

A. In the direcion of the eastbound main track.

Q. Over here on the eastbound main track (indicating)?

A. Yes, sir.

Q. In that direction?

A. Yes, sir.

(Recess until two o'clock).

After recess two o'clock p. m.

Honorable Louis W. Marcus, Presiding).

The Court: There will be an adjournment taken in this case until Monday, February 3rd, at ten o'clock a. m., on account of a death in the family of Judge Bissell.

(The jurors requested the presiding justice to convey their
504 sympathy to justice Bissell).

(Thereupon an adjournment was taken until Monday, February 3rd, 1919, at ten o'clock a. m.)

Monday, February 3rd, 1919,—
ten o'clock a. m.

WILLIAM M. REITHENBURG, resumed the stand for further Direct Examination.

By Mr. Spratt:

Q. Is there a dwarf on the eastbound main track near your tower?
A. Yes, sir.
Q. Is it noted on this map (indicating)?
A. It is between the east and westbound main track.
Q. Is this it, (indicating), known as No. 12?
A. Yes, sir.
Q. And you say that dwarfs are used when the trains are running against the current of traffic?
A. Yes, sir.
Q. Now, did you testify—I have forgotten whether you testified or not—that Mr. Kinney, after you communicated with tower I, did he have the right then to come up as far as dwarf 6?
A. Yes, sir.
505 Q. And if dwarf 6 was purple what was his duty?
A. He was to remain there until such time as the indication cleared.
Q. As long as it was purple?
A. Yes, sir.
Q. And what do you mean by clear?
A. When he would get a clear signal.
Q. Was that green?
A. Yes, the color was green.
Q. In other words, it was his duty to stay there as long as the light was purple?
A. Yes, sir.
Q. And when the light turned to green then he would have the right to proceed?
A. That was the proceed indication.
Q. Out on the main tracks?
A. Yes, sir.
Q. How was the dwarf on that track? How was it taken care of from your tower?

A. It was operated from the tower by a lever.

Q. And what would the operation be, supposing it was purple, and you wanted to give him the right to come in on the main tracks? What would be the operation supposing that the conditions on the main tracks were normal as far as switches and signals were concerned?

A. You would have to arrange your switches on the main track before you could give the signal for a movement against the current of traffic on the Y track.

Q. Would you tell the jury just what movements you
506 would make in order to give him the right to proceed beyond the proceed signal?

A. If the tracks and switches on the main line were normal it would be necessary to unlock the switch on the westbound main track, the eastbound main track, and throw the switch on the eastbound main track, and lock it up, before you could get dwarf signal No. 6.

Q. Is there a bar running along the switches, a protector bar? Is that what you call it?

A. There was a protector bar connected with the locking bar on both switches.

Q. How long is that bar?

A. 50 feet.

Q. When that bar is set or when a train comes in or engine so that it touches that bar, what effect does that have on the interlocking devices and switches?

A. The object of the protector bar is to prevent the switch from being unlocked while there is a movement over it.

Q. So that when there is movement anywhere along that bar is it possible to change switches if the machine is in proper shape?

A. No, sir.

Q. Now, I call your attention to a machine over here to our left in the court room. Is that the interlocking machine that was in the tower?

A. Yes, sir.

Q. At the time of the accident?

A. Yes, sir.

Q. What kind of a machine is it called?

A. Interlocking machine.

507 Q. Do you know what company it is manufactured by?

A. No, I don't remember.

Q. Attached to the machine, and not here, are the wires and chains which connect up with the signals and switches?

A. The switches are operated by a pipe line, also the locking bars, and some of the signals were operated by pipes, while others were operated by a line composed of chain and wire.

Q. And is it in the same condition now with the exception of those wires and chains that it was at the time of the accident? Was it when you operated it here the other afternoon?

A. It appears to be the same machine. There were some electrical devices in the rear there that are not on there now.

Mr. Spratt: I will offer that machine in evidence, if it can be, and I will produce photographs of it.

The Court: If there is no objection, it will be received. In what form shall we take care of it?

Mr. Spratt: By the photographs.

Mr. Ward: I would like Mr. Spratt simply to state the purpose for which it is offered.

Mr. Spratt: For the purpose of illustrating to the jury how these switches and levers were operated, and also showing how if under certain conditions a track is locked, or signals are given, what effect it has on the signals and switches on other tracks and also specially in regard to this Y.

508 The Court: That is what the interlocking or interchange is of these different movements?

Mr. Spratt: Yes.

Mr. Ward: Then I don't object to it.

The Court: Then it is received, and will be shown on the photographs for the use of the jury.

Mr. Spratt: I offer these four photographs in evidence of the machine.

The Court: All of them will be marked in evidence.

(Four photographs received in evidence, and marked "Exhibits A, B, C, and D respectively).

Q. Will you tell me, take Exhibit A, will you tell me what that represents?

A. This is a rear view normal position of levers. The signal is at danger.

Q. I show you Exhibit B. What is that?

A. Exhibit B is a view set for the eastbound Y track.

Q. C? (showing photograph to witness).

A. C is a view with the levers set up for a movement on the east and westbound main track.

Q. What is D? (showing photograph to witness).

A. The machine set in its normal position, all signals at danger.

Q. When the signals are set for the eastbound main track what effect does it have on the Y—the signals on the Y track?

A. It locks the switch to the eastbound Y track.

509 Q. And what effect does that have on the signals and switches—you said it locked those?

A. Locks the switches on the Y track.

Q. What effect does it have on the signal?

A. It has the same effect on the signal.

Q. Puts it at danger?

A. The normal position of the signal is at danger.

Mr. Ward: I suppose in all these questions you are assuming that everything worked all right, aren't you?

Mr. Spratt: Yes.

The Witness: That is my understanding, Mr. Ward.

Q. On the night in question did everything respond when you worked so far as you could see?

A. The machine worked normally.

Mr. Ward: How does he know? I am just going to object if it is intended to cover something that he does not — about.

The Court: He can tell what he knows. That is all he can tell.

Q. You came on, you say, in the afternoon at four o'clock.

A. Yes, sir.

Q. And that was daily?

A. Yes, sir.

Q. And in connection with the lights are there blades on the same signal that work together—blades on the arms that work in conjunction with the lights?

A. The indication by day is taken from the arms of the semaphores, and the indication by night is taken from the lights.

510 Q. Now, up to the time that it got dark could you see the arms from your tower?

A. Yes, sir.

Q. And when you operated the signals and the switches did these arms operate in conjunction properly, function with the signals you were giving?

A. Yes, sir.

Q. And the switches that you were moving?

A. Yes, sir.

Q. I think you stated you did not move No. 6 dwarf signal?

A. That would have been the first movement that evening.

Q. The Kinney movement, if you had made it, would have been the first?

A. It would have been the first movement.

Q. You had not moved the signal, dwarf No. 6, had you——

A. No, sir.

Q. (Continuing:) —from the time you came on, you never moved it?

A. I didn't move dwarf 6 at all.

Q. And was it set normally and at danger according to your machine?

A. Yes, sir.

Q. And according to the arm, too, on there?

A. I didn't see the arm.

Q. Did you notice the arm?

A. No, sir.

Q. And now is there another way that you can tell whether they are working properly or not?

511 A. I don't believe I understand your question.

Q. Can you tell by the pull of the levers?

A. Yes, sir.

Q. How is it, a sort of endless chain that moves these signals, and also the switches?

A. Well, the switch locks are connected directly to the end of the lever by a pipe, and some of the signals are connected in the same

way. The looking bars are connected up by pipe, and those signals that are connected to the levers by chains and wire, it is on the endless chain idea, so that when a signal is pulled one wire goes as far in one direction as the other wire travels in the other.

Q. Can you tell by the pull on your lever whether they are working properly?

A. There is a certain amount of resistance. It depends upon the signal.

Q. That would indicate a normal condition?

A. Yes, sir.

Q. Now, in all the operations that you made of the signals from the time you came on at four o'clock until after this accident happened, was there that same normal pull?

A. Yes, sir.

Mr. Spratt: I would like to have the witness step over to the machine and have the jury see how the machine is operated.

(The witness illustrates the working of the machine.)

Q. Does it work all right?

A. It seems to work all right.

Q. If you will put it back to normal.

512 A. (Witness operates machine.) It is now normal.

Q. I just ask you, in the rear here you see holes punctured through the arms (indicating). What is attached to the ends where these holes are punctured?

A. That is where the device to operate the switches, locks and signals was attached.

Q. And the movement of that up and down moves the switches or the signals, does it, by connection with the pipes or with the wires?

A. Yes, sir.

Q. These levers are all numbered, are they not?

A. Yes, sir.

Q. What is the position of the levers as they are now, and what do they connect with? The one you have your hand on is what?

A. The lock.

Q. Begin at No. 1 and run them down. What is No. 1?

A. No. 1 is the distance signal for the westbound main track, and No. 2 is the home signal.

Q. On the westbound main?

A. On the westbound main track. Three and 4 were spare levers.

Q. That is used——

A. They were not in use.

Q. They weren't in use, not connected at all?

A. Not connected.

Q. That is, they were meant so if switches were added, or signals, they could be used?

A. Yes, sir.

513 Q. But were not in use at that time and were not connected?

A. Yes, sir.

Q. Then the next one.

A. 5 was the home signal on the westbound Y track. No. 6 was the dwarf signal on the eastbound Y track. No. 7 was the dwarf signal on the eastbound main track. 8 was the switch on the eastbound main track. 9 was the lock on the eastbound main track switch. 10 was the switch on the westbound main track. 11 was the lock for the switch on the westbound main track. 12 was the dwarf for the westbound main track. 13 was the block signal for the eastbound main track.

Q. Is that the one that was connected up by electricity?

A. 13, yes, sir. 14 was the home signal for the eastbound Y track. 15 was the home signal for the eastbound main track. 16 was spare.

Q. Now, Mr. Reithemburg, was that the condition of the machine just as it is now, at the time you received the notification that the passenger train was coming from Tonawanda?

A. Yes, sir.

Q. When these levers are out away from you as they are here what is the condition of the signals?

A. At danger.

A Juror: All of them?

A. All of them.

Q. Each one is danger, each one of them? You have told where they connect, and each one of them sets the switch or the light at danger?

514 A. Yes, sir.

Q. When you pull each one towards you what effect does that have on the signal?

A. That changes the signal from danger to clear.

Q. As they stand now, every light on the main tracks, and every light on the switch tracks, on the Y, was set at danger?

A. Yes, sir.

Mr. Ward: Please relate to the indications on the machine.

Mr. Spratt: I am saying, were set at danger so far as this machine could do it.

Mr. Ward: All right.

Q. Now, Mr. Reithemburg, that was the condition of the machine previous to the time you received the warning that the New York Central train was coming from Tonawanda?

A. Yes, sir.

Q. After you got that notification tell the jury what you did, and as you pull each lever tell what it is and what function it performs.

A. When the train 446 left Tonawanda I received four bells, which was an announcement to me that the train had entered my block, and I gave three bells to tower H, the tower in advance of where I was located, and then pulled the clear signals 15 and 13.

Q. Just show what you did?

A. (Witness pulls lever of machine.) That is clearing 15.

Q. Now, just wait a minute, what does that communicate with?

A. The light for No. 15 was the top blade on the home
505 signal.

Q. Home. What puts it to clear?

A. This puts it at clear; changes the line in front of the light from red to green.

Q. Now, the next thing.

A. Then I pulled in No. 15, which worked in conjunction with No. 15, and caused the light on the home signal to go to green.

Q. In connection with that, what happened to your distance signal which you have testified was down at the D. L. & W. bridge?

A. After you have pulled in 15 and 15, and No. 15 has come to clear, then the distance signal on the D. L. & W. bridge automatically goes to clear.

Q. That is the one that is electrically connected, is it?

A. Yes, sir.

Q. Now, what was the condition of your switches at that time?

A. The switches were set for the eastbound and westbound main tracks.

Q. They are set normally, are they?

A. Yes, sir.

Q. So that is their normal condition set for the eastbound and westbound main track?

A. Yes, sir.

Q. That is because the great bulk of the traffic goes that way?

A. Yes, sir.

Q. All right, now, you have got the eastbound track cleared and straightened up for this train to go by your——

A. Yes.

500 Q. To go by your tower. Now, would the levers and the machine in the condition that it would you give Mr. Kinney a clear signal to come on?

A. No, sir.

Q. Why?

A. You would have to get your track before you could call your signal, and your track is set up for the eastbound main track.

Q. If you attempted to change that so that you could give Mr. Kinney the right to come out on the main track, what lever would you have to take hold of?

A. The signal would be No. 6.

Q. Try it.

A. (Witness attempts to pull lever.)

Q. Can you move it?

A. No, sir, it is locked.

Q. Why?

A. It is locked.

Q. That is the signal? Now, about the switches?

A. The switches are also locked.

Q. What switch would you have to move in order to——

A. You would have to throw both the eastbound and westbound switch for that movement.

Q. Try and see if you can move the——

A. You can unlock the westbound switch, but you can't the eastbound switch.

Q. Try the eastbound, because that is the one you worked on. Try the eastbound switch.

A. (Witness attempts to move lever.)

517 Q. Why can't you move it?

A. It is locked through these signals 15 and 13.

Q. Try the switch itself.

A. (Witness illustrates.)

Q. Can you move it?

A. No, sir.

Q. Why?

A. It is locked through this locking lever (Indicating).

Q. Because the eastbound train has the right——

A. Has the signals.

Mr. Spratt: If any of you jurymen would like to get up there on that machine and see if you can move any one of the levers, I would be glad to have you do it.

Q. After that you say you got the notification from tower I that Mr. Kinney's engine wanted to get out on the main track?

A. Yes, sir.

Q. After you had set the track for this eastbound train then you got a notification from tower I that there was to be a movement against the curent of traffic over the Y?

A. Yes, sir.

Q. At that time were the switches set for the Y?

A. No, sir.

Q. What was the signal on the Y?

A. At danger.

Q. That was at dwarf 6?

A. Yes, sir.

518 Q. I think you stated that Mr. Kinney under that direction had a right to come up as far as that dwarf 6?

A. Yes, sir.

Q. But no further?

A. No, sir.

Q. So that you gave the signal permitting him to come up as far as that dwarf, did you?

A. Yes, sir.

Q. That is, you announced to tower I, did you not, that he could come up as far as the dwarf?

A. Yes, sir.

Q. After that what was the next notification that you got?

A. I received an unlock from tower H for Michigan Central train No. 3.

Q. Tower H is south of your tower towards Buffalo?

A. Yes, sir.

Q. And what occurred then when you got that signal?

A. I prepared my westbound track for the movement of train No. 3.

Q. Now, just show the jury what you did to prepare your track for No. 3?

A. I pulled to clear signal 2 which was the home signal and No. 1, which was the distance signal on the westbound main track (pulling levers).

Q. And that gave him a clear track, did it?

A. That was a clear track for Michigan Central No. 3.

Q. The switches, you say, were already set in their normal condition?

519 A. In their normal position, yes, sir.

Q. Now, what effect did that have so far as giving Mr. Kinney a right to come out? Did it change the situation any?

A. I don't believe so.

Q. What effect did it have on the lights, his light?

A. His light was the same as it had been before I started any movements.

Q. And the switches were the same?

A. The switches were the same, yes, sir, in normal position.

Q. Could you change the light that was at dwarf 6 with the levers in the condition which they are now?

A. No, sir.

Q. Could you change the switches?

A. No, sir.

Q. Which lever would you move to change the light?

A. No. 6.

Q. Will you try to move it?

A. (Witness attempts to move lever.)

Q. Can you?

A. No, sir.

Q. Why?

A. It is locked.

Q. How about the light? Was that the light, or was that the switch?

A. No, that was the signal No. 6.

Q. Now, you take the switch. Can you move the switch?

A. No.

520 Q. What number would that be?

A. That would be No. 8.

Q. Try it.

(Witness illustrates.)

Mr. Spratt: Would any of the gentlemen like to test their strength on it?

Q. Now, until after the accident state whether the signals and switches remained in the condition which you have placed them on the machine.

A. The levers were just as they are now until the time I went home.

Juror No. 2: Then the way the levers are now, it left the main track, both east and west, set at green?

A. Yes, sir.

Juror No. 2: So that each, the Michigan Central, and the New York Central, had a clear track clear through?

A. Yes, sir.

Juror No. 2: And the dwarf 6 signal was set at purple or danger?

A. Yes, sir.

Mr. Ward: He says the indications in the tower were. He does not pretend to say what the lights showed.

The Witness: The indications on my lever.

By Mr. Spratt:

Q. Exhibit C shows the position of the machine just as it is now?

A. Yes, sir.

Q. Now, Mr. Reithenburg, assuming that you wanted to give—the levers being in the condition they are, the machine being
521 in the same condition, assuming that you wanted to give Mr. Kinney the right to come out on the eastbound track, would you exhibit to the jury what you would have to do, assuming that you made them in accordance with the request from tower I?

A. I will have to place my signals at normal.

Q. All right, just show how you do it.

A. (Witness moves machine).

Q. What is that for? What did you do that for?

A. That is 13, the block signal, eastbound main track.

Q. That changes the signal to what?

A. From green to red. (Pulling lever.)

Q. Now, you are moving what lever?

A. No. 15.

Q. What does that effect?

A. That changes the home signal from green to red.

Juror No. 2: That is on the main track?

A. On the main track, yes, sir.

Q. What effect does that have on the distance signal on the bridge?

A. Just as soon as I touch*ed* the first lever there the distance signal there goes to red. (Witness pulls lever.) No. 1 distance signal on the westbound main track.

Q. What does the movement of that lever accomplish?

A. That pulls the distance signal on the westbound main track.

Q. To red, to danger?

522 A. Yes, sir. (Witness pulls lever.)

Q. What is that?

A. That is the home signal on the westbound main track.

Q. That puts that at danger?

A. From green to red, yes, sir.

Q. That fixes the signals, does it, so that both tracks, both main tracks, are at danger?

A. On all the tracks.

Q. The tracks are at danger everywhere?

A. Everywhere.

Q. How are the switches?

A. The switches are set and locked for the eastbound main track.

Q. What is the next thing you do?

A. Set up your switches, had to get your iron before you can get your signal. (Witness pulls lever.) No. 11 is the lock——

Q. That lock releases the lever that moves the switch, doesn't it?

A. No——

Q. It unlocks it?

A. Out at the switch there is a piece of iron something like this (indicating) attached to the end of the rail, and when you throw that lever into that position from normal to reverse, it pulls out a lug and makes it possible to move the switch back into another position.

Q. In other words, it releases the switches——

A. So that you can move it.

Q. It unlocks it.

A. No. 9 is the lock for No. 8.

Q. When you get that moved that changes the switch?

523 A. No, sir, that just unlocks the eastbound switch. No. 10 throws the switch on the westbound main track, and No. 8 the switch on the eastbound main track (illustrating). No. 9 (illustrating) locks up the switch on the eastbound main track. The iron is now set to come off of the Y on the eastbound main track.

Q. That is, by the iron you mean the switch?

A. The rails. And No. 6 is the signal.

Q. And that changes——

A. That changes from purple to green.

Mr. Ward: He has now got the machine set up for Kinney, has he?

A. Yes, sir.

Mr. Spratt: To come out on the eastbound main track.

Mr. Ward:

Q. Just ask him, with the machine set up for Kinney, what his first movement would be to take it away from Kinney?

Mr. Spratt: Just let me ask what I have got, and then I will. I am just going to follow that up.

Q. Is that locked now? When you moved back that lever did that lock the switches?

A. This (indicating) is the lock. No. 9 locks the switch on the eastbound main track.

Juror No. 2: Those are all locked? All those that you have got your hand on there?

A. No, I haven't locked up the switch on the westbound main track, because I haven't any movement to make over it.

Mr. Spratt: Kinney was to go on the eastbound.

524 A. But you have to throw the westbound switch, before you can get the eastbound switch, so as to divert a reverse

movement on the westbound main track. It is just an additional point of safety, I suppose.

Q. Just a precaution.

A. Precaution. Not a necessity.

Q. What effect does that have now on changing the lights on either of the main tracks?

A. The lights on both main tracks are normal, at danger.

Q. Can you change them with your levers remaining as they are there set for the Y?

A. No, sir.

Q. Can you change the switch?

A. No, sir.

Q. Try it. Try the light for the westbound main.

A. (Witness illustrates.) It is locked. The switch is set for the westbound main track but not locked up.

Q. Try the one for the eastbound, No. 15.

A. (Witness illustrates.) It is locked.

By a Juror:

Q. You spoke about the three levers controlling the switches, and then one controlling the signal. What signal does that control?

A. No. 6, the dwarf signal, located on the eastbound Y track.

Q. After you have changed those three levers for the irons, supposing you did not move this one (indicating) for the switch?

A. It would still be at danger.

525 That is the one that gives the clear signal on that track?

A. Yes, sir.

Q. That could not be moved to clear until you had moved those others?

A. No, sir. The movements over the machine must succeed each other in predetermined order. You can't pull them up in a haphazard way.

Q. The movement on the track levers would have to be all complete before this lever could be released?

A. Yes, sir.

By Mr. Spratt:

Q. The first principle is that the iron must be set, the iron or the track must be set before you can change the signals?

A. Yes, sir.

Q. And then the first signal that you change is which one, the home or the distance?

A. Change in which way?

Q. In this condition as it is now.

A. There is only the dwarf signal involved in this movement.

Q. That is the only one you can change?

A. Yes, sir.

Q. And so the only change in that light that you can make, or signal, is from danger to safety or safety to danger?

A. From purple to green, yes, sir.

Q. And so with the machine as it is, the only change you can make with reference to dwarf 6 would be from safety to danger?
A. Yes, sir.

526 Mr. Ward: Or vice versa.
Mr. Spratt: I say as it is now.

Q. Now, what motions would you have to go through, what movements would you have to make in order to change the signals as they are now, so as to give a clear track to the Michigan Central and to the New York Central trains?
A. You would have to take the——
Q. Just go through it, will you?
Mr. Ward: What would be the first one, the very first movement you would make.
A. Put your signal on the eastbound Y track at danger.
Mr. Ward: That is this dwarf?
A. Yes.
Mr. Ward: That would be the first movement you would make would be to take the signal away from Kinney?
A. Yes, sir.
Q. If he had it, and you wanted to change the main track movements, the first move you would make would be to take the light away from him?
A. Yes, sir.

By Mr. Spratt:

Q. Then what would be the next movement?
A. Then unlock your eastbound Y switch, and throw your eastbound switch? (Illustrating). Place your westbound switch normal, and lock up your westbound switch and your eastbound switch. Then you can set up your signals. Your track is normal now.
Q. Now, set up your signals.
527 A. (Witness illustrates). No. 15 eastbound home signal (indicating), No. 13 eastbound lock signal (indicating).
Q. That gives the New York Central a clear track, does it, going east?
A. Yes, a clear signal for the New York Central 446.
Q. Then you go to the westbound track?
A. Then clear up the westbound. Signal No. 2 home signal (indicating), westbound main track. Signal No. 1 (indicating), distance signal on the west bound main track.
Q. The signal and the switches are in the position they were the night of the accident just before the accident?
A. At the time of the accident.

(Witness turns to the witness stand).

Q. One of the jurors has asked me why some of those levers were painted red and some green.

The Court: Very well, you can answer that if you can.

A. The levers painted red indicated that they were connected with the signals and the black ones were the switches, the blue ones the locks.

Q. Those are the colors?

A. Yes, sir.

Q. Mr. Reithenburg, did you see this engine and caboose as it approached the main tracks?

A. Yes, sir.

Q. About where was it when you first saw it?

A. About half way between the dwarf and Hertel avenue.

Q. Was the Michigan Central train coming at that time?

528 A. Yes, sir.

Q. About where was that train?

A. About at Hertel avenue.

Q. And could you tell about the relative rates of speed of the two engines as they came along there? Could you judge?

A. Mr. Kinney's train or engine was moving very slow. I don't think they exceeded seven miles an hour. The Michigan Central seemed to be running at about its normal speed.

Q. That would be how much along there?

A. About 20 miles an hour.

Q. And did you notice any signals being given from the front end of the caboose of Mr. Kinney's——

A. There was a hand signal being given in the direction of a stop signal.

Q. That you state was a hand signal, a stop signal?

A. Yes, sir.

Q. Will you exhibit to the jury just the kind of a signal you saw given there?

A. It was a signal made with a white lantern swung crosswise on the track (indicating).

Q. Was that signal given more than once?

A. It continued to be given up to about, or very nearly the time of the collision.

Q. After the collision did the caboose go out on the track?

A. The caboose passed out on the eastbound main track, and collided with the engine of train 446.

Q. And then what became of train 446?

529 A. Train 446 continued on down the eastbound main track to where the overturned engine of Michigan Central No. 3 lie, and shoved the caboose up on top of this overturned engine.

Q. Here are the switch points on the main track from the Y? (indicating). How far beyond these switch points did the New York Central train go before it came in contact with the Michigan Central?

Mr. Ward: If he knows.

A. I don't know.

Q. Did it go beyond the switch?

A. Yes, sir.

Q. Give us your best judgment about how far beyond the switch that it went?

A. Why, the engine of the Michigan Central was turned over at this point (indicating). 2499 was coming out this track (indicating) and the Michigan Central No. 3 was coming down that track (indicating), and the two engines fouled there (indicating), and the Michigan Central was tipped across the eastbound main track, and Mr. Kinney's engine lay in here somewhere (indicating).

Q. So that the Michigan Central engine lay about opposite on the eastbound track, about opposit- the fouling point on the westbound track and the Y?

A. Somewhere in there. I didn't make any examination of it.

Q. But the engine did go down on the eastbound track south of the Y, did it?

A. The caboose went out on the eastbound——

530 Q. I meant as the New York Central after the collision—did it come down——

A. It went down and run into this overturned engine.

Q. And at a point south of the switch points?

A. Yes, sir.

Q. From the Y onto the eastbound main track?

A. Yes, sir.

Q. What did you do from the time you saw the collision there, up to the time that the New York Central train collided with the Michigan Central engine that was overturned?

A. Why, after these two engines came together, the next thing I observed this caboose running out by the tower on one of the tracks, which later on developed to be the eastbound main track, and I hurried across the tower to the right-hand side, and with one hand I raised the window and with the other hand I picked up the red lamp and stuck it out the window in an effort to warn 446.

Mr. Spratt: That is all.

Cross-examination.

By Mr. Ward:

Q. Now, Mr. Reithenburg, you were an experienced towerman, weren't you?

A. Yes, sir.

Q. And you had worked for the New York Central for how many years?

A. Up to the time of the accident? I began work for them on September 17th, 1907.

Q. And worked with them until this——

531 A. The accident occurred October 12th, 1908.

Q. What had you done before that?

A. I was a telegraph operator.

Q. For the New York Central?

A. No, sir, for the Standard Oil Company, Western Union, Postal.

Q. This was your first experience then, with machinery similar to that which is in court here?
A. Yes, sir.
Q. You had worked at this tower how long?
A. As I stated, from September 17, 1907 until October 12th, 1908.
Q. So far as the movements there at this tower were concerned, the arrangement of the switches and signals was entirely in your control, wasn't it?
A. Yes, sir.
Q. Now, here was an accident at your tower which resulted in piling up three trains, wrecking three trains?
A. Yes, sir.
Q. And you were freed from all blame, weren't you?
A. Yes, sir.
Q. By the New York Central authorities?
A. Yes, sir.
Q. And you told your story as to how the thing happened that night?
A. Yes, sir.
Q. And at that time Mr. Kinney's story had not been heard.
A. Why, I dont know.
Q. Who did you tell your story to?
532 A. When you say "story" are you referring to some of the statements that were made there?
Q. Who did you first tell?
A. I told Mr. Allen.
Q. Mr. Allen?
A. Yes, sir.
Q. Who is he?
A. He was the chief signalman at that time.
Q. Where did you tell him?
A. In the tower.
Q. That night?
A. About a half hour after the accident, yes, sir.
Q. At that time Mr. Kinney was down under the coal?
A. I don't know where Mr. Kinney was. I have heard that he was down there.
Q. They didn't get him out for two hours afterwards, did they?
A. I don't know, I wasn't down there.
Q. You knew they didn't get him out until after the wrecker arrived, didn't you?
A. I have heard so since.
Q. Did you see the fire?
A. I saw the fire, yes, sir.
Q. Did you see the fire department coming?
A. Yes sir.
Q. It wasn't until after that that the wrecker came, and Mr. Kinney was got out?
A. Some time after that.
Q. Then who was the next man in authority over you that you told your story to, after Mr. Mullen?

533 A. I didn't tell it to anybody else that night, but the next day I reduced the statement to writing.

Q. And gave it to whom?

A. Mr. Allen.

Q. Do you know who Mr. McEwen is?

A. He was the superintendent at that time.

Q. Did he get there to that tower very quick after the accident?

A. Why, I should think within an hour after the accident.

Q. Did he take your statement?

A. No, sir.

Q. He did take the statements of Mr. Mullen and Mr. Sauer there in your tower?

A. I don't know just who made statements. There were several men in and out there, and I know that the superintendent did have some conversation with them.

Q. And did some writing there, didn't he?

A. Yes, sir.

Q. Now, after going through an experience which resulted in three trains being wrecked at your tower there were no penalties of any sort imposed on you?

A. No, sir.

Q. You continued to work for the New York Central until you quit of your own accord?

A. Yes, sir.

Q. And that was how long afterwards?

A. I left their service January 4th, 1916.

Q. When you went on duty there at four o'clock in the afternoon did you make any examination of these switches and signals,

534 to see whether they were working?

A. No, sir.

Q. Do you actually know whether the light at dwarf 6 showed green or purple when you went to work?

A. No, sir.

Q. Did you look at it?

A. No, sir.

Q. Do you know whether the arm on the dwarf showed danger or clear?

A. No, sir.

Q. Do you know how it was at any time from that time until the accident?

A. No, sir, only by the indication of my lever.

Q. On the machine?

A. Yes, sir.

Q. But how it actually was you don't know?

A. I made no examination.

Q. Did you leave your tower and go down to look at it after the accident?

A. No, sir.

Q. You stayed in your tower?

A. I stayed right in the tower.

Q. Had you operated the lever No. 6 which controlled that signal so as to find out whether it was working or not before the accident?

A. No, sir.

Q. If that lever had not been working that would not have prevented the operation of the rest of the machinery, would it?

A. I don't know what effect it would have on the rest of the machinery.

535 Q. Well, if the connections between that lever, the end of that lever, the wire and chain connections out to the dwarf, were cut or clogged or stuck, that would not affect the operation of the rest of the machinery, would it?

A. I don't think so.

Q. Before I ask you further about the operation of this machinery I want to ask you a little about the accident. I think you stated in answer to Mr. Spratt's questions that you saw Mr. Kinney's engine about halfway between Hertel avenue and what point?

A. And the dwarf signal.

Q. Halfway between the dwarf signal and Hertel avenue?

A. Yes, sir.

Q. That would be about the point I indicate by my pointer (indicating).

A. Yes, sir.

Q. And at that time you say you saw No. 3 at Hertel avenue?

A. About at Hertel avenue.

Q. They both kept on coming and finally they both came together?

A. Yes, sir.

Q. Did No. 3 increase or decrease its speed from the time you first saw it?

A. Why, I noticed a little change in the operation.

Q. Were you watching?

A. I was watching it, yes, sir.

Q. As a matter of fact, Mr. Reithenburg, you were standing in the door of your tower looking for No. 3, weren't you?

536 A. Yes, sir.

Q. At that time you had known for some minutes that Kinney's engine was proceeding from tower I towards your tower?

A. Yes, sir.

Q. Now, when you saw Kinney's engine coming into view did you notice that signal at first, that hand signal that you mentioned?

A. Yes, sir.

Q. And you continued to notice that from the time when you first saw it down to about the time of the accident?

A. Yes, sir.

Q. Now, Mr. Reithenburg, was that a signal swung outside the line of the caboose or was that a signal swung across the platform of the caboose that you saw?

A. The signal was being swung in the——

Q. Just answer that question, please. Was the signal that you saw swung outside the line of the caboose or was it swung across the platform of the caboose?

A. I don't know.

Q. Did you know any more about that on the previous trials than you do now?

A. No, sir.

Q. I call your attention to your testimony at folio 2019 on the last trial, and did I ask you this question: "Was it being swung across the platform of the caboose?" and did you answer "In the direction across the platform of the caboose, yes, sir?"

A. Yes, sir.

537 Q. Then did I ask you: "No, no. Was it being swung across the platform of the caboose?" and how did you answer it?

A. Yes, sir.

Q. Do you answer it that way now?

A. Yes, sir.

Q. So that the signal that you saw as the caboose approached you was being swung across the platform of the caboose, wasn't it?

A. Yes, sir.

Q. Why didn't you tell me that in the first place, Mr. Reithenburg? Why didn't you tell me that when I asked you that a moment ago?

A. I can't see that I have made any change, Mr. Ward.

Q. Did the signal that you saw continue to be swung across the platform of the caboose up to the time of the accident?

A. About the time of the accident.

Q. Continuing in the same way?

A. Why, yes, about the same signal.

Q. So that it will be perfectly clear, this platform of the caboose that this signal was being swung across was the platform at the front end of the caboose, wasn't it, the end of the caboose nearest you?

A. The end of the caboose nearest me, that is where the signal was being given.

Q. And the caboose was between that platform and the engineer, wasn't it?

A. Between the platform and the engineer?

Q. Yes.

A. Yes, sir.

Q. The caboose was?

538 A. Yes, sir.

Q. From the time that caboose came into your view halfway between the tower and Hertel avenue, did you see any other form of signal being given except the swinging of the lantern across the platform of the caboose as you describe?

A. No, sir, I noted no change.

Q. Did you see the man jump?

A. No, sir, I couldn't see the man at all.

Q. I want to get back to the operation of the tower with you, Mr. Reithenburg. Of course you are familiar with the rules of operation governing that business there at that time?

A. Why, I was at that time yes, sir.

Q. If Mr. Kinney had been given the green light did you have any business to change the switches and give lights to the other trains on the other track?

A. No, sir.

Q. That would have been contrary to rules, wouldn't it?

A. Yes, sir.

Q. If Mr. Kinney had been given that green light so that he saw it, and his fireman saw it as they approached Hertel avenue, did you have a business to take it away from him?

A. No, sir.

Q. That is, if he saw that light he had a right to assume that he could proceed out on the main track, didn't he?

A. That was his indication.

Q. That told him just as plainly as words could tell it that the switches were set for him, and they are set against movements
539 on the main track?

A. Yes, sir.

Q. And while we are speaking of the main track, that is all main track, isn't it, in railroad parlance?

A. Why, in railroad parlance, but I believe there was some understanding—we referred to these tracks running off in this direction (Indicating) as the Y tracks.

Q. But in railroad parlance they were all main tracks governed by main track rules?

A. Governed by main track rules, yes, sir.

Q. What kind of traffic ran over these tracks that we have called the Y track?

A. Freight traffic; whatever there was to move there.

Q. Some passenger traffic?

A. There was a work train made up that went to the Buffalo Bolt at Gratwick came over there. That I believe was the only passenger train.

Q. If you had set up those signals for Mr. Kinney, and you heard that a passenger train was coming along, a fast passenger train, got hand indication, what would you do?

A. You want me to give you the practice?

Q. Yes. If you had set up those signals for Mr. Kinney, and you heard that a fast passenger train was coming along, wanted to pass by your tower, what would you do?

A. It would depend upon where I heard about this passenger train.

Q. Supposing you had heard about the passenger train
540 after you had given Mr. Kinney the signal to proceed up to dwarf 6, then what would you do?

A. Let him proceed.

Q. Let Mr. Kinney proceed?

A. Yes, sir.

Q. Supposing you hadn't set the dwarf for Mr. Kinney, and you got a signal that a passenger train was coming, and Mr. Kinney was coming, which one would you give the preference to?

A. The passenger train.

Q. Why?

A. Passenger trains are usually run on schedule. Such movement as Mr. Kinney had was not a movement that there was any great haste about.

Q. Supposing you had got an indication that Mr. Kinney wanted to come and the passenger train wanted to come, and your levers were set up about as you indicated there at first, everything—what did you call it, normal?

A. Normal.

Q. Everything at normal, then who would you give the signals to first?

A. Give them to the passenger train.

Q. Supposing you had given those signals to Mr. Kinney, and then got word that the passenger train was coming would you take them away from Kinney?

A. No, sir.

Q. Under no circumstances?

A. Why, unless there would be some very pressing emergency.

Q. Would you stop the passenger train and let Kinney come on?

541 A. Yes, sir.

Q. Why would you do that?

A. That was the rules of operation.

Q. That you could stop a passenger train to let a switch engine come out on the main track and turn around?

A. Yes, sir.

Q. Are you sure about that?

A. Yes, sir.

Q. When you stop a passenger train to let a switch engine come out and turn around, who do you have to explain that to?

A. The explanation is made to the dispatcher.

Q. And you always have to make an explanation if you stop a passenger train to let a switch engine come out?

A. All delays are explained, yes, sir.

Q. What?

A. Delays are explained, yes.

Q. That is, if you should stop a passenger train to let a switch engine come out and turn around, you would get an inquiry right away from some of your superiors, wouldn't you?

A. No, you would report that fact as you reported the train movement.

Q. Report it?

A. Yes, sir.

Q. Give a reason for it?

A. Give a reason for it, yes, sir.

Q. If you had a signal from Mr. Kinney at tower 1 that he wanted to come on, and you knew there was a train coming from Niagara Falls five miles away, would you let Mr. Kinney out on the track ahead of that train five miles away?

542 A. No, sir.

Q. You wouldn't do it?

A. No, sir.
Q. Why?
A. He might cause delay to the passenger train at some other point.
Q. Did you know this train coming from Niagara Falls was a passenger train?
A. Yes, sir.
Q. How did you know it?
A. By the bells I received.
Q. The bells you receive are four bells, aren't they?
A. Yes, sir.
Q. On the plunger?
A. Four bells made on the plunger.
Q. That indicates there is a train coming that wants to go on the main track, doesn't it?
A. Yes, sir.
Q. It doesn't indicate whether it is a passenger or freight, does it?
A. Its indication was for passenger trains.
Q. You would get exactly the signal if it was a freight train, wouldn't you?
A. No, sir.
Q. What difference would you have?
A. On the fourth bell the plunger would be held, causing the bell to ring for a longer period.
Q. That would mean that the train wanted to take the Y track, wouldn't it?
A. That would mean that the train wanted to take the Y track, yes sir.
Q. If it was a freight train that wanted to take the main track, what indication would you get?
543 A. Unless they had made some special arrangement with the towerman at 57 we would get the indication for the Y track, and when they got to our signal and found that we were diverting them to the Y track, they would whistle for the main track.
Q. So that you wouldn't get a freight indication for the main track under any circumstances?
A. No. There was no call for a regular signal to handle freight trains up the main track to tower H.
Q. Now, would you be kind enough to go over to the machine there and set the levers at normal?
A. Yes, sir.

Mr. Ward: May I have that done, your Honor?
The Court: Yes.

(Witness steps to machine and sets the levers to normal.)

The Witness: That is the normal position.

By Mr. Ward:

Q. You have got your switches set up for main line movements, but your signals set against all movements?

A. Yes, sir.
Q. Would a switch engine approaching from the Y have anything
o do with the time tables?
A. No, sir.
Q. He relied entirely on you, didn't he?
A. He relied upon the block signal indication.
Q. Now, starting from where you are, set the machine up for Mr.
Kinney.

(Witness sets up machine.)

544 Q. Is the machine set up for Mr. Kinney?
A. Yes, sir.
Q. And he has a green light, hasn't he?
A. No, I haven't pulled in the signal.
Q. Give him a green light.

(Witness pulls lever.)

Q. Now, Mr. Reithenburg, supposing you wanted to change that
nd fix the signals for the main tracks, what is the first move you
vould make?
A. Pull number 6 lever back.
Q. That would be to take the green light away and put the purple?
A. Yes, sir.
Q. Do that.

(Witness pulls lever.)

Q. What is the next move you would make?
A. Unlock the eastbound Y switch.
Q. Do that.

(Witness pulls lever.)

Q. What is the next move you would make?
A. Throw the eastbound Y switch.
Q. Do that.
A. (Witness moves levers.)
Q. Now, do you find the switch set for Mr. Kinney? Is the switch
now set for Mr. Kinney?
A. No, sir.
Q. Set the switch so that Mr. Kinney can go out on the main
track.
A. (Witness moves lever.)
Q. The light is still against him?
A. Yes.
Q. But the switch is in his favor?
545 A. Yes.
Q. When that caboose broke loose from the engine did
it take the same course as it would have taken if the switch
had been set for it?
A. Repeat the question.
Q. When the caboose broke loose from the engine and went out on

the main track, did it take the same course as it would have taken if the switch had been set for it?

A. Yes, sir.

Q. Was it derailed?

A. No, sir.

Q. And did it pass right on up the track where Kinney's engine would have gone if he had the switches and the lights and everything had been set in his favor?

A. Yes, sir.

(Witness returns to witness stand.)

Q. Of course, before Mr. Kinney could come out there he had to have the signals and the lights, didn't he?

A. Yes, sir.

Q. And that is a movement that was made every day, letting a switch engine out there to turn around, wasn't it?

A. Yes, sir.

Q. Several times a day?

A. Some days.

Q. And you had to regulate other traffic so that could be done as long as you could?

A. I would rather put it the other way; regulate that according to your other traffic.

Q. But it was a matter of your judgment, wasn't it?

546 A. Yes, sir.

Q. All the time when you were on duty?

A. Yes, sir.

Q. As to which one should go ahead was up to you?

A. Yes, sir.

Q. And your business was not to interfere unnecessarily with passenger traffic?

A. Yes, sir.

Q. To allow these turning movements to be made, because it was necessary in the railroad business, but to restrain them in such a manner as not to interfere with the passenger traffic?

A. Yes, sir.

Q. If Mr. Kinney had been coming down there with the lights set for him and the switches set for him, and for any reason, the approach of a passenger train, or any reason, you had decided it would be better not to interfere with the passenger train, what should you do?

A. Well, that all depends. If I should—that is a matter for my judgment.

Q. Supposing you made up your mind you would let that passenger train go through, and not interfere with it, then what would you do? Kinney had the lights.

A. If I had given Mr. Kinney the signal I would complete the movement of Mr. Kinney.

Q. I know. I am asking you a hypothetical question. Supposing you had decided to let the passenger train go through and not inter-

fere with passenger business, and Mr. Kinney had the lights, what is the first movement you would make?

547 Mr. Spratt: I object to that, as not based on the facts in the case.

The Court: This is cross examination, and I am going to take it.

Mr. Spratt: Exception.

Q. What would be the first movement you would make?

A. The first move I would make would be assuming that Mr. Kinney had the signal, would be to take it away from him.

Q. That would be the first move?

A. Yes, sir.

Q. That would take about a second, wouldn't it?

A. Yes.

Q. You can change that whole business——

Mr. Spratt: You mean under the conditions as they exist on the machine as you left it there? Is that it?

Mr. Ward: Yes. Kinney had the signals. That was my question.

Q. Kinney had the signals, and you made up your mind to let the passenger train go through, the first move would be to take the signal away from Kinney?

A. Yes, sir.

Q. If you did that then you were bound to see that he stopped?

A. Yes, sir.

Q. Before you took any switches away, weren't you?

A. Yes.

Q. You had a right under the rule in cases of emergency to take the light away, did you?

548 A. Under an emergency.

Q. But you didn't have any right to give the signals to the other trains or to change the switches until you actually knew that Kinney had stopped?

A. Yes.

Q. It was your business to know that Kinney had stopped before you did anything else wasn't it?

A. Yes.

Q. And, of course, on this night when he came down there, from the time he came into your sight, he was back of the dwarf when you first saw him?

A. Yes, sir.

Q. And never stopped and you didn't see him stop?

A. No, sir.

Q. And he came right up on to the main track?

A. Yes, sir.

Q. And at that time as you testified, the switches were set against him?

A. Yes, sir.

Q. It doesn't make any difference, does it, whether Kinney saw that dwarf green halfway between Hertel avenue and the dwarf, or

whether he saw it, green on the south side of Hertel avenue? It all meant the same thing to him, didn't it?

A. Any time he saw it clear it was an indication that he could move past the dwarf, yes, sir.

Q. And out on the main track?

A. Yes. It didn't make any difference about the distance.

Q. If he saw it down, here, south of Hertel avenue, and
549 never looked at it again, it meant the same thing to him, did it?

A. Yes.

Q. If he saw it south of Hertel avenue, and never looked at it again, he knew if everything was working right, and you lived up to the rules, that there couldn't be any trains coming on the main track?

A. He wouldn't know what was going on on the main track. That permission was for him to move on out there. He had nothing to worry about the main track. I took care of that.

Q. He knew if you were attending to your business there wouldn't be any trains out there to run into him, didn't he?

A. Yes, sir.

Q. Now, Mr. Reitchenburg, how quick normally could you make a complete change, take the whole business away from Kinney and give it to the main track? How long does that take you in a normal operation?

A. I think something above 17 second or something of that sort.

Q. Mr. Wing, after the accident—this gentleman who sits here with Mr. Spratt and Mr. Huntington (Indicating)—Mr. Wing went out there, didn't he?

A. Yes, sir.

Q. And you and Mr. Wing made a test as to how long it took to make a complete change?

A. Yes, sir.

Q. And without hurrying or getting unduly excited, that was 17 seconds?

550 A. Yes, sir.

Q. That is two seconds more than a quarter of a minute?

A. Yes, sir.

Q. On a previous trial you have computed for me how many times you could do that while Kinney was running from Hertel avenue to the point of accident, haven't you? How many times you could change the whole thing?

A. How many times I could change the levers, yes, sir.

Q. Levers and lights. Pardon me—levers. When you say "levers" you include it all?

A. I am talking about the levers.

Q. You computed for me on a previous trial how many times you could do that while Kinney was running from Hertel avenue to the dwarf at seven miles an hour, did you not?

A. Yes, sir.

Q. How many times could you do it?

A. I believe there was some dispute about it. I don't just remem-

ber the figures that you gave. It seems you and whoever was trying the case at that time didn't agree on the number of seconds. But it is two and a half times, something like that——

Q. It was four times, wasn't it?

A. It might be. I have never figured it. You were the one that did the figuring.

Q. I will give you a pad and perhaps Mr. Spratt and I can agree that your figures are correct. We have stipulated that the distance from Hertel avenue to the dwarf is 457 feet, and that it is 60 feet further to the point of accident, or 517.

551 A. 517.

Q. It is generally computed that you multiply the rate of speed by 1½ to get the number of feet per second. Take the rate of speed at six miles per hour, or nine feet a second, how many seconds——

Mr. Spratt: 8.8 feet per second.

Q. 9 is more favorable to you than the other. Call it 9. If he is traveling at the rate of 9 feet a second how many seconds would it take Mr. Kinney to travel that 517 feet?

A. About 57.

Q. About 57 seconds?

A. Yes, sir.

Q. If you can change that whole business in 17 seconds, how many times can you do it in 57 seconds?

Mr. Spratt: I object to that. The testimony was that it took 17 seconds to come back to the situation as it was before.

Mr. Ward: No, he could make a complete change in 17 seconds.

Mr. Spratt: No, I don't read it that way.

The Court: Let him tell what he meant by the 17.

Q. What was it you did in 17 seconds, Mr. Reithenburg?

A. Why, I believe that I took the signals away from the eastbound Y track and set them up for the eastbound main track, or just the reverse. It was one way anyway.

Q. Made a complete change from Kinney to the other fellow?

Mr. Spratt: I object to that.

552 A. I think it was the other way. I think I took the signals away from the east and westbound main track and gave the signal to Kinney.

Mr. Spratt: That is just half the movement.

Mr. Ward: That is what we said.

Mr. Spratt: You said the whole movement.

Q. You had the signals all set up for one movement?

A. Yes, I think that was for the main track.

Q. Then you took them away and set them up for Kinney's movement?

A. Yes, sir.

Q. That took 17 seconds?

A. Yes, that is my understanding.
Q. How many times could you do that in 57 seconds?

That I object to. He has to get them back to the original posi tion again before he can take them away.
Mr. Ward: If he did it once that is all I need.
Mr. Spratt: You are asking how many times he can do it.
Mr. Ward: I just want to show how many more times than onc he could do it.
Mr. Spratt: You are simply skipping one of the movements.
Mr. Ward: You don't understand my question.
The Court: Does the witness understand your question? That i the main thing. If he does let him answer.

553 Q. How many times do you find that that change coul have been made from the main track to Kinney in the 5 seconds?
A. Three times and some over.
Q. 17 into 57 three times and some over?
A. Yes, sir.
Q. Of course to change the light, Mr. Reithenburg, which woul have been the first thing you would do, that wouldn't take but second, would it?
A. Just to reverse the lever.
Q. Mr. Reithenburg, if the signals had all the time been set fo the main track movements those trains would come through at thei normal speed, wouldn't they?
A. Yes, sir.
Q. This train, this No. 3 train, was a fast train going to Detroit o some place?
A. It ran from Buffalo to St. Thomas to my knowledge. Hou much further it went I don't know.
Q. Its normal rate of speed along there was in the neighborhoo of 30 miles an hour, wasn't it?
A. Yes, sir.
Q. And there is no occasion for its slowing up at your tower pro vided the signals are all right for it?
A. Yes, sir.
Q. The other train, the Niagara Falls train, I suppose that sam thing applies to it, doesn't it?
A. Yes, sir. I would like to modify that statement in this way They must take into consideration the grade crossing at Hertel ave nue. If you get that far away from the tower I don't know
554 The Court: What is that?
The Witness: He was asking me if the relative speed o these trains would be what he figures it should average on thei entire run, and I ask him to take into consideration the grade cross ing at Hertel avenue. So far as my tower and signals go, they could go by there——
Q. You never mentioned anything about the effect of the grad crossing on either of the main line trains before, did you?

A. I don't remember. I do recall, though, something of that sort.

Q. The normal speed of the Niagara Falls train by your tower would have been in the neighborhood of 35 or 40 miles an hour, wouldn't it?

A. I would say upwards of 30 miles an hour.

Q. Would it have been in the neighborhood of 35 or 40 miles an hour?

A. It may have been. I couldn't tell you that.

Q. Did you testify on the former trial as to the Michigan Central train, that you presume they took those crossovers there at 30 miles an hour?

A. Yes, I believe I did.

Q. If they had the signals all right?

A. Yes, sir.

Q. Do you say that now?

A. That was a matter for the judgment of the engineer.

Q. You don't change that testimony now, do you?

A. No, not a bit.

555 Q. As a matter of fact, that night this Michigan Central train came up at such a speed that when the two engines came together they both rolled over, didn't they?

A. Both engines turned over, yes.

Q. And the train to which the Michigan Central engine was attached didn't leave the track?

A. I believe the first car had one pair of trucks derailed.

Q. That is all as far as you know?

A. That is as far as I have heard. I didn't make any——

Q. When you stood there in the door of your tower looking down in the direction of No. 3, when you first saw Kinney at the point you have indicated to us, halfway between the tower and Hertel avenue, that Michigan Central was at Hertel avenue?

A. About at Hertel avenue.

Q. He wasn't traveling 30 miles an hour then, was *it*?

A. I don't know. This train was coming head on to me, and this thing occurred at night.

Q. So that you would rather place the points at which you saw the trains than estimate the speed? That is right, isn't it, Mr. Reithenburg?

A. Why, I am more sure, yes. I knew where Hertel avenue was.

Q. So that whatever its usual rate was, which you say was 30 miles an hour over those crossovers——

A. Yes.

Q. Whatever its usual rate was that night its speed was such that it went from Hertel avenue to the point of the collision while Kinney, traveling at six or seven miles an hour, was going from

556 the point where you first saw him to the point of collision?

A. Yes, sir.

Q. Is the space all clear in between those tracks?

A. Not at present.

Q. I mean then.

A. Yes, sir.

Q. It was then?
A. Yes, sir.
Q. Mr. Kinney operating the switch engine would be on the side away from the passenger engine, wouldn't he?
A. Yes, sir.
Q. And the passenger engineer operating the passenger engine would be on the side towards Kinney's engine, wouldn't he?
A. Yes, sir.

(Short recess.)

After Recess.

WILLIAM M. REITHENBURG resumed the stand for further cross-examination:

By Mr. Ward:

Q. Mr. Reithenburg, have you talked to anybody about your testimony since you left the stand?
A. What is that?
Q. Were you talking with anybody about your testimony since you left the stand during the interruption in my cross examination?
557
A. Do you mean about what I have told here?
Q. Yes.
A. Why, no, not that I remember of.
Q. What was Mr. Spratt talking to you about?
A. There was no question brought up that I have already answered here.
Q. You were talking to Mr. Spratt about the case?
A. About the case, yes, sir. Not about the testimony.
Q. At the time we recessed I was asking you about how this No. 3 would have gone by your tower provided the signals had all been set in his favor. If the signals had been set against No. 3 what would it have done?
A. If the signals were set against No. 3 it would come to a stop down at tower H, where the distance signal No. 1 was located, and then proceed under control, prepared to stop at signal No. 2.
Q. That is, if the distance signal had been set against it at tower H it would have proceeded slowly prepared to stop down here at the intersection (indicating), is that right?
A. Before it reached signal No. 2, yes, sir.
Q. As it came down over that distance, if while it was passing along signal No. 2 cleared up, then it would have gone right along, wouldn't it?
A. Yes, sir.
Q. So that if the signals were set against No. 3, instead of in its favor, it would have come down towards your point slowly instead of fast?
558
A. Yes, sir.
Q. What did you say about the grade crossing, in answer to Mr. Spratt's suggestion that the grade crossing might have done something?

Mr. Spratt: Mr. Spratt's suggestion?

Mr. Ward: Yes, you in your opening to the jury told the jury that the train came slowly there not because the signals were against them, but because of the grade crossing.

Q. What was it you said about the grade crossing in your direct examination?

A. I don't recall anything being said about the grade crossing.

Q. Do you think they slowed up on account of the grade crossing at that time?

A. I think No. 3—yes, that is my opinion.

Q. Usually?

A. Usually. I will not say they all did.

Q. You think they usually slowed down?

A. Yes, sir.

Q. Do you remember your previous testimony on that subject, Mr. Reithenburg?

A. No, I do not.

Q. On the last trial—we will not have to go back so very far—at page 517 were you asked the question on cross-examination: "Q. Did I understand you to say that the Michigan Central train No. 3 in coming, approaching Hertel there westbound, did those trains in practice slow up at all for that grade crossing?" and did you answer, "I don't know as they did at that time"?

A. No, I don't.

559 Q. Is that the way you swore before?

A. Yes, sir.

Q. Why did you say right here since Mr. Spratt made that suggestion in his opening, why did you say right here a moment ago, Mr. Reithenburg, that you thought they did slow up for the grade crossing at that time? Or didn't you mean to say that?

A. I will answer your first question first, and then we will take up the other one. There was a slow order at one time while Mayor Adam was mayor. Now, whether that was at the time of the Kinney accident or since, I don't know.

Q. Did they slow up at that time or didn't they?

A. I don't know.

Q. Did you swear as I have showed you on the last trial?

A. Yes, sir.

Q. Did you swear on the last trial that, "I don't know as they did at that time?"

A. Yes, sir.

Q. Did Mr. Spratt say anything to you about that slowing up at the grade crossing during the recess here?

A. No, sir.

Q. Now, ordinarily, Mr. Reithenburg, you don't desire to change your testimony that ordinarily they come by over those cross-overs at 30 miles an hour—that train?

A. You are referring to the switch at tower 55?

Q. Yes.

560 A. That would be a fair estimate of their speed.

Q. And on this occasion when they collided with Mr. Kinney's engine they weren't going more than eight or ten miles an hour, were they?

A. I don't know at what speed——

Q. What is your judgment about it as you looked down there?

A. Mr. Kinney's engine was going about 7 miles an hour.

Q. How fast do you think the other was going?

A. Are you referring to the Michigan Central?

Q. At the time of the collision, yes, sir.

A. I think about 20 miles an hour.

Q. You think it was going about 20 miles an hour?

A. Yes, sir.

Q. At the time of the collision?

A. Yes, sir.

Q. And yet you say that it took it the same length of time to go from Hertel avenue to the frog as it did Kinney going at 7 miles an hour from the point you saw him to the frog?

A. About that. Those are my best estimates.

Q. Let us take the Niagara Falls train. If that train had had clear signals down on the bridge and at your tower, it would be going by your tower at the usual speed, wouldn't it?

A. Yes, sir.

Q. And that usual speed would have been about 35 miles an hour, wouldn't it?

A. Yes, sir.

561 Q. Now, that night, for some reason it didn't come by that fast, did it?

A. No, it did not.

Q. If the signals had been set against the Niagara Falls train instead of in their favor, it would have come up to your tower slowly, prepared to stop, wouldnt it?

A. It would have come up to signal 15.

Q. Slowly?

A. Yes, sir.

Q. Prepared to stop?

A. Yes, sir.

Q. And if the signal cleared up as it approached it, then pick up and go on?

A. Yes, sir.

Q. That was all in your control?

A. Yes, sir.

Q. After this caboose passed over on to the main track, in the route that Mr. Kinney's engine would have gone if the switches had been set in his favor, it broke loose from his engine, didn't it?

A. Yes, sir.

Q. And went down the track?

A, Yes, sir.

Q. And on a previous trial at my request you marked your initials at about the point where you thought it went to, didn't you?

A. Yes, sir.

Q. Will you be kind enough to come up here and see if it is the same? Is that the place, Mr. Reithenburg, near the "Kam" (Indicating)?

A. Yes, sir, it was somewhere this side of "Kam."

562 Q. It is about at the point where the initials "W. M. R." are? That is about the point?

A. Yes, sir.

Q. And we measured that and found that was in the neighborhood of 750 feet or something of that sort, from the tower, did we?

A. I believe there was something about 700 stipulated.

Q. This caboose was going down the track towards the Niagara Falls train quite rapidly, wasn't it?

A. Yes, sir.

Q. And collided with the Niagara Falls train, didn't it?

A. Yes, sir.

Q. It came right back with the Niagara Falls train, didn't it?

A. It was on the pilot of the engine.

Q. It was on the track, wasn't it?

A. Yes, sir.

Q. All its wheels were on the track, weren't they?

A. Yes, sir, so far as I know.

Q. Just as if the other train was just pushing it along?

A. Yes, that is the idea.

Q. It was not derailed?

A. Not that I know.

Q. Wasn't smashed up so far as you know?

A. No, not that I know.

Q. And it came back by your tower?

A. Yes, sir.

Q. And ran into the wreck in some way?

563 A. It was set up on the overturned engine Michigan Central engine.

Q. And then burned up?

A. Yes, sir.

Q. That is what caught afire?

A. The caboose.

Q. If that engine hit that caboose and didn't knock it off the track, or smash it, it wasn't going 35 miles an hour, was it?

Mr. Spratt: I object to that, as entirely speculative.

The Court: This is cross examination.

Mr. Spratt: He is not a speed expert. He is a towerman.

The Court: Yes, he is a towerman. He has told us quite a lot of things on the speed here. He may answer. It is cross examination. I will give you an exception.

Mr. Spratt: Yes.

Q. That engine that struck that caboose and brought it back without smashing it up or derailing it wasn't going 35 miles an hour when it hit the caboose going in the opposite direction?

Mr. Spratt: I object to it. There is no proof that some part of it wasn't smashed or broken.

Mr. Ward: It may have scratched the paint. That is not what I mean.

Q. Was it, Mr. Rithenburg?

Mr. Spratt: I will take an exception.

The Court: The jury will remember what the proof was on that, and I will permit him to cross examine the witness.

564 Mr. Spratt: Exception.

A. I don't know.

Q. You don't think it was, do you?

Mr. Spratt: I object to it. He has answered the question.

Q. You don't think it was, do you, in your experience as a railroad man?

A. I don't know how fast they were going.

Q. You wouldn't venture an opinion that it was going 35 miles an hour, would you, and hit a light caboose going in the opposite direction, without knocking it off the track?

Mr. Spratt: I object to that. He has already answered it.

The Court: I think he has already said that.

Q. I have just one further question to ask you, Mr. Reithenburg. If you had got notice that there was a freight train coming from Niagara Falls, and Kinney wanted to turn there, there would have been no objection to your turning him, would there?

A. I don't believe I understand your question.

Q. If you had had notice that there was a freight train coming from Tonawanda, I mean, instead of Niagara Falls, and also Kinney wanted to turn, there would have been no objection to turning him ahead of a freight train, would there?

A. That depends upon the time in which I would have to make the movement.

Q. If the train was five miles away, you would have plenty of time, wouldn't you?

565 A. Ordinarily, yes. I am assuming that Mr. Kinney is there at the signal ready to make this turn.

Q. Where he can turn? Certainly. Assuming you have given him permission to come up to a dwarf, and you know he is there, or nearly there? Now, just get back to the question I asked you a little while ago. Did you have any means of knowing when you got that signal from Tonawanda whether that was a freight train or a passenger train?

A. Yes, sir.

Q. Now, Mr. Reithenburg, I want you to stop and think about that.

A. The train 446 was a scheduled train, Mr. Ward.

Q. Did you have any means of knowing from the signal that you received whether that was a passenger train or a freight train?

A. It was a——

Q. No, don't reason it out to us. But did you have any exact

means of knowing whether that was a passenger train or a freight train?

A. I was reasonably satisfied that it was a passenger train.

Q. Did the signal tell you? Did that signal tell you whether it was a freight train or a passenger train?

A. No, sir.

Q. It didn't tell you, did it?

A. No.

Q. Now, Mr. Reithenburg, since I pressed you on this subject haven't you changed the testimony that you gave here a little while ago that there was something about the plunger that told
566 you the difference between a passenger and a freight? Didn't you swear to that?

A. Oh, Mr. Ward, you were talking awhile ago about a freight train. Of course, I assume that when you speak of a freight train you mean the regular freight train movement, and I did tell you there was a difference, and there is.

Q. When I speak about a freight train I mean a freight train. Is there any difference between the signals that you got for a freight train and a passenger train from Tonawanda?

A. Yes, sir.

Q. There is a difference?

A. Yes, sir.

Q. A difference in that bell signal?

A. Yes, sir.

Q. Between a freight train and a passenger train?

A. Yes, sir.

Q. Were you asked this question on the last trial: "Q. Four bells. So that when you got this signal of four bells the only reason you had to think it was 446 was because it was nearer the time of 446, you were rather expecting it? A. Yes, sir. Q. It might have been a freight train put in there? A. Yes, sir. Q. For all you knew? A. For all I knew, yes, sir. I couldn't see down to 56." Did you swear to that before?

A. Yes, sir.

Q. Was that true?

A. Yes, I couldn't see the train.

Q. Have you got any interest in this lawsuit?

A. No, sir.

567 Q. Are you still anxious to have it appear that you were in no way to blame for that collision when three trains piled up at your tower?

A. No, sir.

Q. You don't care?

A. I don't care.

Q. You don't care whether they blamed you for it or not?

A. No, sir.

Q. Never did?

A. Never did.

Redirect examination.

By Mr. Spratt:

Q. Did you know that you weren't to blame?
A. I knew then and I know now.
Q. That you weren't to blame?
A. That I was not to blame.

Mr. Ward: He doesn't care what anybody thinks about it.
Mr. Spratt: If the court please, I don't think he has any right to interrupt me, and I don't think he has a right to lecture the witness. He answered him as fairly as he could.

Q. I think, Mr. Reithenburg, you made a mistake. You stated you began to work September 17th, 1908. My recollection is that it was 1907 that you commenced to work?
A. That is when I commenced to work for them, September 17th 1907, and the accident occurred October 12th, 1908.
Q. So that you had worked at this tower a little over a year at the time the accident happened?
568 A. Yes, sir.
Q. And you continued to work at that tower until the time you left there—what year was that?
A. January 4th, 1916.
Q. And then you got a better position, did you?
A. Yes, sir.
Q. And left. Now, the counsel asked you whether you went down to look at the signals, et cetera, after the accident happened, or whether you went down to see where Mr. Kinney was. Did your duties require you to be in the tower after that?
A. I remained in the tower so far as I recall. I may have been downstairs to fix up the fire or something of that sort, but I made no examination of any part of the wreck.
Q. Did your duty require you to be in the tower to take and receive signals especially after this wreck here, so as to handle the traffic?
A. I had business enough to keep me going in the tower.
Mr. Ward: What is that?
A. I had sufficient business in hand to keep me going in the tower.
Q. After this wreck was it necessary for you to stop other trains that might come in there?
A. I don't recall just what was done. There was the——
Q. Did you have to give notice to the other people of the wreck there?
A. The notice had to be sent to the dispatcher and the yard master, and the chief signalman, and there was many things to be done there.
569 Q. Did notice have to be given that the track was blocked, so as to prevent other trains from coming in there?
A. I notified the dispatcher immediately.

Q. The counsel has asked you about changing the signals there, nd asked you about the length of time that it took—or rather he sked you the switches—was that it—and you told him it took 17 econds.

A. My understanding of his question was that he wished to know ow long it would take to make a change if the signals had been et at clear on the east and westbound main track, and I wanted to ive a signal for a movement such as Mr. Kinney wanted to make, nd I told him how long it took to operate the levers, yes, sir.

Q. Was there anything else necessary to do to make a complete hange there?

A. Not in that movement, no, sir.

Q. But if you made a complete movement there, what became of he main tracks under that movement that he asked you to make?

A. The signals on the main tracks would all be at danger.

Q. Now, assuming that at the time he asked you to make that novement, the signals for the main track were clear for the main rack, then what would you have to do? Would you have to make ny other movements in order to give Mr. Kinney——

A. I would have to put the signals on the east and westbound main tracks to danger, and set up the switch for the west and
570 eastbound main tracks, and lock the eastbound switch, and then give Mr. Kinney the signal.

Q. And that would take you about how much longer than 17 econds?

A. That would be the move I could make in 17 seconds. That s the one.

Mr. Ward: A complete change. That is what that is.

Q. Do you mean that would be a complete change?

A. From the main tracks to Mr. Kinney—to a movement such s Mr. Kinney wanted to make, yes, sir.

Q. In order to take them away and give the man on the main rack a clear signal, what would you have to do under those con- litions?

A. Just the reverse. Put the signal against Mr. Kinney, and nlock the eastbound switch, place it normal. Place the westbound ormal. Lock both the east and westbound switches up, and clear he signals on the east and westbound main tracks.

Q. How long would it take you to do that?

A. To handle the levers, it would take, I assume, about 17 seconds, s Mr. Wing——

Q. Starting from the position in which the east and westbound nain track men had the right to use that track, then changing it o that Kinney would have the right to use the track, and then putting it back to the position so that they would have the right o use the main track, that would take you 34 seconds, wouldn't it?

A. Just to handle the levers, yes, sir.

571 Q. Then what did you mean when you answered Mr. Ward's question that three changes could be made within he 57 seconds?

A. I divided the number of seconds by 17, and I stated that I could handle the levers three times in 57 seconds, or less than that.

Q. But if you made a complete movement that I have indicated to you, you couldn't do it in——

A. We were just referring to the operation of the levers.

Q. Just the operation of the levers, nothing more?

A. Yes, sir.

Q. But you would have to operate the other signals that I have referred to, wouldn't you, in a complete movement?

A. Yes, sir, in a complete movement you would.

Mr. Ward: May I ask Mr. Spratt to indicate what he means by a complete movement?

Q. So that instead of three times you could only make one and a half movements?

A. I don't know.

Q. I say, if you could do the other—I think you said three times——

A. Such a movement as you say——

Q. Such a movement as Mr. Ward indicated. If you made the complete movement which I have indicated you could only do it once and a half approximately?

A. Yes, sir.

(Recess until two o'clock P. M.)

572 After Recess—Two o'clock p. m.

WILLIAM M. REITHENBURG, resumed the stand for further Redirect Examination.

By Mr. Spratt:

Q. Mr. Reithenburg, Mr. Ward asked you if you looked at the dwarf, and also whether you looked to see whether the wires were broken. Now, Mr. Reithenburg, if the wires are broken what position would the dwarf go to?

A. The dwarf would remain normal.

Q. The dwarf would remain normal?

A. Yes, sir.

Q. That is, if it was purple it would remain purple?

A. Yes, sir.

Q. And if it was green, what would it do?

A. It would go to purple.

Q. And that, you say, would be a stop signal?

A. Yes, sir.

Q. Are there men that inspect the condition of the wires, and so forth, and of the dwarf signals?

A. Yes, sir.

Q. And that is their work, is it?

A. Yes, sir.

Q. And so when you come on duty you take the machine as it is turned over to you by the previous operator?
A. Yes, sir.
Q. And if there was anything wrong with it so far as the previous operator is concerned, does he notify you?
573 A. Yes.
Q. On this occasion when the previous operator turned it over to you, did he notify you that there was anything wrong with the machine?
A. No, sir.

Mr. Ward: Who was the previous operator?

Q. What was the previous operator's name?
A. Mike Kinsella.

By Mr. Ward:

Q. Do you know where he is now?
A. No, sir.
Mr. Spratt: We don't either.

By Mr. Spratt:

Q. The counsel asked you if the wires were cut or clogged, what would happen, and you answered him that you didn't know. Did that ever occur while you were there at this dwarf signal—the wires cut or clogged?
A. No, I don't recall of any case where we had.
Q. So that you couldn't answer him?
A. No, sir.
Q. Now, I call your attention to the rule that has been read here in evidence: "If a signalman has prepared for an approaching train, and it is found necessary to stop them or change the position of the switches or signals to give another route, the signals must be set at danger but no switch changed or signals given to a train on a conflicting route, until the train which first had the right of track has come to a full stop." Were you familiar with that rule?
574 A. Yes, sir.
Q. Assuming that signal was green when Mr. Kinney claims he was at the vicinity of Hertel avenue, under that rule did you have a right to change that signal at any time before he passed it?
A. Under that rule, yes, sir.
Q. Assuming it was green you would have a right to change it to purple?
A. Yes, sir.
Q. Was it incumbent upon him to observe that signal, and to know before he passed it whether it had changed or not?

Mr. Ward: I object to that, the witness not qualified. He is not an engineer. He doesn't know whether he has a right to rely on

the signal of the head end brakeman, or whether he has got to watch himself.

Mr. Spratt: He is in the tower.

The Court: You have read a rule, and you are asking him whether they should observe it.

Mr. Spratt: Yes, sir, whether it was the practice to observe it.

Mr. Ward: I have no objection to that question, but he has asked him whether Mr. Kinney should keep watching the tower to see whether he takes it away from him. That involves the question whether Mr. Kinney had the right to rely on the signals of the head end brakeman, who was put there to do that very thing, and I submit that Mr. Reithenburg, who is a towerman should not
575 testify as to the duties of an engineer.

Mr. Spratt: And so far as his tower, and his signals were concerned, it was his duty to observe.

Mr. Ward: The question here in this lawsuit is whether Kinney was under obligation to do it personally or whether he had a right to rely on the head end brakeman who was there for that purpose.

The Court: I will let him answer.

Mr. Ward: I except.

A. He would of course have to observe it to note whether or not it would change.

Q. Before he passed it?

A. Yes, sir.

Q. It says, "But no switch changed or signal given to a train on a conflicting route, until the train which first had the right of track has come to a full stop." Would you have had the right to change the switches, even though Mr. Kinney passed the dwarf, until he came to a full stop?

A. No, sir.

Q. That is, you would have no right to derail him, or anything of that kind?

A. No, sir.

Q. If you changed his signals before you could give the trains on the main track signals to come on, you would have to see that Mr. Kinney came to a full stop?

A. Yes, sir.

Q. If Mr. Kinney had a clear signal there at green what would have been the signals under that condition on the main tracks?

576 A. Normal.

Q. And that would mean they would be set against the main track operations?

A. Yes, sir.

Q. Now, merely giving the signal to Mr. Kinney clear from danger, that would not change the signals on the main track, would it?

A. I don't understand the question.

Q. If you merely gave Kinney a danger signal from a clear signal, changing it from clear to danger, that of itself would not change the signals on the main track?

A. No, sir.
Q. They would be still set at danger?
A. Yes, sir.
Q. State whether it is usual or unusual to delay passenger trains at times for a switching movement or for a freight movement?
A. Oh, passenger trains are stopped where necessity demands it.
Q. So that if you started making a switching movement or ready to make a switching movement, do you at time stop passenger trains in order to complete that movement?
A. I have stopped passenger trains, yes, sir.
Q. Do you know Mr. Wing who sits near me?
A. Yes, sir.
Q. Do you remember of his coming to the tower sometime in January following this accident?
A. Yes, sir.
Q. Was that same apparatus there in the tower that was there at the time of the accident?
577 A. Yes, sir.
Q. Was it in the same condition?
A. It appeared to be.
Q. Did you show Mr. Wing how you manipulated it on the night of the accident?
A. Yes, sir.
Q. And did he manipulate it too? Did he take it and manipulate it, and go through the same motions that you went through?
A. Why, I believe he tried some of the operations.
Q. He was there some little time, wasn't he?
A. Yes, sir.
Q. Observed the workings of it?
A. Yes, sir.

Mr. Spratt: That is all.

Recross-examination.

By Mr. Ward:

Q. Did you have another interview with Brother Spratt this noon, Mr. Reithenburg?
A. Yes, sir.
Q. Where was that?
A. At Mr. Spratt's office.
Q. Did you talk about the terms of peace that Mr. Wilson is arranging in Paris?
A. I don't know as we discussed the President, no.
Q. What did you talk about?
A. Why, things in general.
Q. Nothing about the case, of course?
A. I wouldn't say that the case wasn't mentioned if that is what you are trying to tie me down to.
578 Q. I suppose they had Mullen and Boyle there, too, didn't they?

A. I didn't see Mr. Mullen.

Q. Didn't you see Mullen and Boyle there?

A. No, I did not.

Q. This rule at page 18, I noticed that when Mr. Spratt asked you if you would take that light away from Mr. Kinney, you said you could according to the rule. Was there some further explanation you could make on that subject? Is there anything further in your mind?

A. No, nothing——

Q. Is it ordinarily done to take the light away from a man when it is given to him once?

A. No, it is not. You would have—it would have to be something unusual.

Q. Was there anything unusual there then?

A. No, nothing unusual.

Q. Would the announcement to you of a coming passenger train after you had given Mr. Kinney permission to proceed, would that justify you in taking away the light?

A. No, sir.

Q. You gave Mr. Kinney his permission to proceed from Tower I before you knew that No. 3 was coming, didn't you?

A. Yes, sir.

Q. Now, Mr. Reithenburg, I wanted to ask you one or two things about the mechanical features of this tower that Mr. Spratt has not gone into. I was hoping he would, to save me the trouble, but I don't think the jury understand, unless possibly Mr. Whiting understands, about the way the thing works at the switches. Now,
579 this device is up in a two-story building, isn't it?

A. Yes, sir.

Q. And that is a couple of hundred feet from this particular dwarf?

A. Yes, sir.

Q. This is what you would call a manually controlled board? A manual control, is that what you call it?

A. Yes, the man operating the machine, he furnishes the horse power.

Q. That is, they have some where electricity furnishes it, don't they?

A. Some block stations are operated by electricity and some are operated by air.

Q. But this one the operator has got to furnish the muscle to do the business?

A. Yes, sir.

Q. You live there during your eight hours, don't you?

A. Yes, sir.

Q. Bring your meals there, and you have a stove that you keep going to keep yourself warm in the winter time?

A. Yes, sir.

Q. Now, running from the other side, where the jury got around back of the thing, running from that side are connections that go out to these various switches and signals?

A. Yes, sir.

Q. Some of them are operated by pipe connections, I think you told Mr. Spratt?

A. Yes, sir.

580 Q. But this particular one is operated by a line of wires and chains that pass over and around various pulleys before it reaches the dwarf signal, doesn't it?

A. Yes, sir.

Q. The thing you try to do when you pull that lever is to make the disc move backward and forward in front of the lantern? That is what you are trying to do when you pull that lever for No. 6?

A. Yes, sir.

Q. When it is one way there is a purple disc in front of the lantern, and when it is another way there is a green disc in front of the lantern?

A. Yes, sir.

Q. And there are two lines that run out to that thing?

A. Yes, sir.

Q. When you pull the thing in one direction it pulls one of those lines, and when you push it in the other direction it pulls the other?

A. It is a kind of an endless chain.

Q. You can't push on the thing of course, it has to be all done by pull?

A. If you return your lever to normal you pull the lever over.

Q. And that pulls the opposite chain?

A. That pulls the opposite chain.

Q. When that leaves the signal lever itself, it consists of two chains or two wires? What is the first link in the chain?

A. I don't know. They are part wire and part chain.

581 Q. Let us take it step by step. There is either a wire or chain, first, that goes down to the ground, isn't there, from your second story?

A. I know there is a chain where it passes around the pulley that is fastened in the floor or to the floor of the tower.

Q. There is a pulley in the floor of the tower?

A. Yes, sir.

Q. And a piece of chain goes around that?

A. Yes, that takes it outside.

Q. And where does it leave it outside, at the ground?

A. Yes, sir.

Q. So that from the lever itself there is something that runs down through the tower?

A. Yes, sir.

Q. And then there is a right angle with a pulley?

A. Yes, sir.

Q. That goes outside the tower?

A. Yes, sir.

Q. After you leave the pulley what is it, wire or chain?

A. I think there is a chain that runs around the pulley that is in the bottom of the tower, and there is a short piece of wire between the chain that takes it around the pulley that goes down.

Q. Then there is a short piece of wire running out towards the track?

A. Yes, sir.

Q. Then you get another pulley, and you change the direction to the left, don't you?

A. Yes, sir, runs down toward the dwarf signal.

582 Q. So as to make this plain, you come down from the second story of the tower to the ground, then you come out to the track? That is, the second pulley, isn't it?

A. Yes, sir.

Q. It is wire out to the track, and then chain around the pulley?

A. Yes, sir.

Q. Then it becomes wire again, and runs down to a point opposite the dwarf?

A. Yes, sir.

Q. That is all open there?

A. Yes, sir.

Q. Not covered up in any way at that time?

A. No, sir.

Q. Then when it gets down opposite the dwarf it passes around a third pulley, doesn't it?

A. Yes, sir.

Q. Where it passes around the third pulley, it becomes a chain again, doesn't it?

A. Yes, sir.

Q. Then after it passes around the third pulley then it becomes a wire again?

A. Crosses under the track.

Q. Then you have to carry that wire, or a pair of wires—it is a pair of wires all the while?

A. Yes, sir.

Q. You have to carry that pair of wires under the first pair of tracks, don't you?

A. Yes.

Q. Is it covered up or protected in any way as it goes under those tracks?

583 A. There is a bar placed on the ends of each of the ties to hold the ties apart, and between the two ties it is not filled in.

Q. So that this wire is merely run between two ties, and the ties are held so that they can't press in and pinch the wires, by a couple of iron spreaders?

A. Yes, sir.

Q. There is nothing over the top of those wires to keep people from stepping on them or coal dropping on them, or anything of that sort?

A. No, sir.

Q. Then that pair of wires passes over to the dwarf itself, don't they?

A. Yes, sir.

Q. Just about even with the ground?

A. Yes, sir, just about.
Q. Then it has to come up to the dwarf?
A. Yes, sir.
Q. Does it pass around another pulley where it comes up to the dwarf?
A. I think that—yes, there is a pulley on a block, and that is what it sets on.
Q. It becomes a chain again there?
A. Yes, it is fastened to this——
Q. And then it fastens to this disc?
A. Yes, sir.
Q. So the thing that has to respond to that lever, when you pull that lever there, in order to pull the disc on this dwarf, passes down from the second story of the tower to the ground, then around a pulley where it becomes a chain, then out onto the track, then it becomes a chain again around the pulley, then it proceeds
584 alongside the track to opposite the dwarf, and then becomes a chain again opposite the pulley, and then goes up the tracks and around another dwarf? Have I got that correct?
A. Yes, sir.
Q. So that it changes its direction once at the bottom, a right angle, once when it reaches the track, a right angle, a third time when it passes under the track, a right angle, and a fourth time when it turns up in the dwarf, a right angle? Now, those frequently get out of condition, don't they, Mr. Reithenburg?
A. I don't quite understand what you mean.

Mr. Spratt: I object to that, as incompetent, and improper, unless it is confined to the time in question. Any machine may get out of order at some time, but that is not this time.

Mr. Ward: Counsel offers this device here in the court-room, and has exhibited the operation of it at great length by Mr. Reithenburg, for the purpose of showing how it operates, and of asking the jury to draw conclusions from its being in certain positions, that it must operate automatically to produce certain results. Now, I think it is competent and respectfully offer that proof both on cross examination, and I expect to follow it by considerable proof in rebuttal, if Mr. Spratt does not abandon that claim, showing the failures of this machine to operate automatically as is claimed for it by the defendant.

Mr. Spratt: I object to that.
585 The Court: Overruled.
Mr. Spratt: If the court will just let me get it on the record.
The Court: Yes.
Mr. Spratt: I object to it on the ground that the question at issue is what its condition was at this time and how it operated at this time, not what its condition might have been at some other time.
The Court: Of course that is true, that is the real question here, but I say that he has a right to show here that this apparatus does get out of order.

Mr. Spratt: There is no claim that it would not, that it might no at some time. Any machine will get out of order.

The Court: Then if there is no such claim, there can't be any objection to his testimony.

Mr. Spratt: He must confine his proof to the time in question It is extremely prejudicial to permit any testimony of this kind tha he seeks to introduce, to go on the record or go before the jury.

The Court: Very well.

Mr. Spratt: Exception.

(Question read.)

A. I would not say frequently.

Q. Well, sometimes.

A. Sometimes.

Mr. Spratt: I ask that the answer be stricken out, entirely incom petent, on the same ground that I urged against the introduc tion.

586 The Court: Motion denied.

Mr. Spratt: Exception.

Q. They even have a printed book, don't they, Mr. Reithenburg to tell what to do in case of this defect or that defect; a book of rule telling you what to do in case of each particular defect developing

Mr. Spratt: I object to it, as incompetent, irrelevant and im material. The question at is-ue is what was its condition at th time.

The Court: I will allow him to answer.

Mr. Spratt: Exception.

The Court: This is a cross examination of this expert regardin the operation of this machine that we have had shown here, an testified at such great length to us, and explained on general princ ples, not applying it simply to this occasion.

Mr. Spratt: I beg your Honor's pardon. It is part of the cro examination. I didn't ask him any such thing. I asked him ho the machine operated at this time, not whether it had been out o order or anything of that kind, or whether it was impossible to get out of order.

The Court: I will take it.

Mr. Spratt: Exception.

(Question read.)

A. There are rules that give instructions to the men to mak repairs.

Q. And they have men who just make it their business to go fro tower to tower and repair defects as they develop, don't they?

587 Mr. Spratt: Same objection.

The Court: Same ruling.

Mr. Spratt: Exception.

A. They have repairmen, yes. sir.
Q. And they had repairmen who had charge of this tower at this time?
A. Yes, sir.
Q. And how many towers does one repairman have charge of?

Mr. Spratt: I object to it, as incompetent and improper, witness not competent to answer.
The Court: Same ruling.
Mr. Spratt: Exception.

A. I don't know how many towers this particular repairman looked after.
Q. Did you have any experience in any other towers around there at that time?
A. No, not at that time.
Q. Now, this place around here where the Y tracks went, and where these wires ran open and exposed, there is a good deal of walking by persons down and across there?

Mr. Spratt: I object to it, as incompetent, immaterial and irrelevant. If there is any walking or change it is competent—it might be from the time he went on duty until the time of this accident.
The Court: What does this question relate to, to the general walking that is done around where this apparatus is?
Mr. Ward: Yes. The witness has testified that these wires
588 ran around pulleys and alongside of the track, and that they were open and exposed, and I am trying to show the use of that neighborhood, the conditions.
The Court: Is that confined to this period of time?
Mr. Ward: Yes, previous to this accident, of course.
Mr. Spratt: How long previous to this accident?
Mr. Ward: The general practice that existed at that time.
Mr. Spratt: Before four o'clock, the time that he went on duty, up to the time of the accident, I object to.
The Court: He may answer.
Mr. Spratt: Exception.

(Question read.)

A. People did walk on the track, yes, sir.

Mr. Spratt: I ask that that be stricken out.
The Court: Same ruling.
Mr. Spratt: Exception.

Q. There are factories in that neighborhood?
A. There are some industries there.
Q. Right opposite this dwarf was the Kam Malting Company at this time?
A. Yes, sir.
Q. There was a switch that ran into the Kam Malting Company, wasn't there?

A. Yes, sir:

Q. And among the things that you controlled was that switch?

A. Yes, sir.

589 Q. Between the time that you gave Mr. Kinney permission to proceed up to that switch, and the time of the accident did you do something with that switch?

A. I don't know whether it was after I gave Mr. Kinney permission to come up there or before.

Q. See if you can remember.

A. But I had an engine working up there, and put him into clear.

Q. That was something that you had to look after?

A. Yes, sir.

Q. See that he didn't interfere with any of the other movements?

A. Well, he has only interfered with the movement of train No. 3.

Q. Then you wouldn't put him in the clear until after you knew that No. 3 was coming?

A. No. 3 being a train that was made up at Buffalo we figured No. 3 would be right on time.

Q. But there isn't any doubt, is there, as you testified here a few moments ago, that you knew Mr. Kinney was coming before you knew No. 3 was coming?

A. Yes, I knew Mr. Kinney—I had bells on Mr. Kinney's movement before I received any bells on No. 3's movement, if that is what you mean.

Q. You knew that Mr. Kinney was much closer to your tower when you got his announcement than No. 3 was when you got its announcement, didn't you?

A. Yes, sir.

590 Q. You told Mr. Spratt something about the duty of the engineer. You never were an engineer, were you, Mr. Reithenburg?

A. No, sir.

Q. Did you mean that you understood it was Mr. Kinney's duty to keep watching for things himself, or that it was his duty to know about it by reason of either his own eyes or the eyes of the persons entrusted to perform that duty for him?

Mr. Spratt: I object to that, as incompetent and immaterial.

The Court: He may answer it.

Mr. Spratt: Exception.

The Court: If he knows he can tell.

(Question read.)

A. I was assuming that the engineer could observe the dwarf himself.

Q. You don't pretend to testify as to what the engineer's duties are, do you?

A. No, sir.

Mr. Spratt: I object to it, as incompetent and improper.

The Court: Same ruling.

Mr. Spratt: Exception.

Q. You don't know, do you?
A. I am not an engineer.
Q. You know as to how it was there in the tower? You have seen the engineers pushing trains and cars, haven't you?
A. Yes, sir.
Q. And you know about the stationing of the men out on the end of the car where he can have an uninterrupted view of things?
A. I have seen them come along there with a man on
591 top of the forward car, yes, sir.
Q. You have seen them give signals to govern the operation of the train, haven't you?
A. Yes.
Q. That is a common practice when they are pushing cars, to have a man stationed on the front end of the leading car for that purpose, isn't it?
A. Yes, sir.
Q. You don't want to be understood as saying that you regarded it as the engineer's duty personally in all cases to see the dwarf signal? You don't take that position?

Mr. Spratt: I object to that. He has already answered it.
The Court: He may answer it again.
Mr. Spratt: Exception.
The Court: Let us clear up the question. It is his explanation. This is cross examination.
Mr. Spratt: But you can't ask a question 40 times.

(Question read.)

A. Now, when I made that reply I assumed that the engineer was able to see the signal.
Q. And was relying on his own eyes and not somebody else's?
A. Yes, sir.
Q. That is what you assumed in answer to Mr. Spratt's question?
A. Yes, sir.
Q. I just want to get back to the 17 seconds, so that there will not be any doubt about it. That 17 seconds was having the signals all
set up for Kinney, and then starting out to change them un-
592 til they were all set up for the other track, and all against Kinney, wasn't it?
A. My impression is that the signals were set up for the east and westbound main track.
Q. All against Kinney?
A. All against Kinney.
Q. All against Kinney, and all in favor of the main track?
A. All in favor of the main track.
Q. Then it took you 17 seconds to take them away from the main track and set them up in Kinney's favor?
A. That is my impression.
Q. That is what the 17 seconds is?
A. Yes, sir.
Q. It would be just as long to do it the other way?
A. To handle the levers, yes, sir.

Q. Do I understand that at no time did you actually know what the light showed to Kinney or how the arm on the dwarf stood?
A. No, sir.
Q. All you know is what your tower showed you?
A. Yes. All I know is the indication of the lever in the tower.
Q. What it showed down there on the ground, around all these pulleys, 200 feet away, you don't pretend to swear here?
A. I made no examination of it. I believe I have so stated.

Mr. Ward: That is all.

593 Redirect examination.

By Mr. Spratt:

Q. And what did the lever indicate?
A. The lever indicated that the signal was at danger.
Q. And that would be purple?
A. Yes, sir.
Q. Now, with reference to when the caboose was being pushed back there, was it dark at the time?
A. It was 8:40 at night.
Q. Was it dark then in October?
A. Yes, sir.
Q. Could you see the caboose itself?
A. No, sir.
Q. What could you see that indicated to you a caboose?
A. I could see the markers.
Q. What were the markers?
A. They are two green lights placed at either side of the caboose well up near the roof.
Q. And you could see the man himself who was giving the signal, or was it the signals that you saw?
A. I saw nothing but the indication, the white light.
Q. And where apparently was the man standing?
A. He was on the forward platform of the caboose.
Q. Which side of the caboose?
A. On the righthand side.
Q. And you indicated that he was giving what you call a stop signal?
A. It appeared to be a stop signal to me.
594 Q. And that appeared to be, you say, across——
A. Crosswise of the track.
Q. You knew about the direction of the track at that point?
A. Yes, sir.
Q. And the signal appeared to be given crosswise of the track?
A. Yes, sir.
Q. Did it swing out beyond the green light that you have spoken of here to the right?
A. I didn't take notice as to the relation of the two.
Q. Did you take away any signal from Mr. Kinney?
A. No, sir.
Q. Or did you change the signal at any time after you got—of the

dwarf at any time after you heard that Mr. Kinney wanted to come in on that track?
A. No, sir.
Q. Did your lever at all times indicate that that dwarf was purple?
A. Yes, sir.

Mr. Spratt: That is all.
Mr. Ward: No more.

595 CHARLES L. MATTERN, was duly sworn as a witness in behalf of the defendant:

Direct examination.

By Mr. Spratt:

Q. Mr. Mattern, where do you live?
A. 71 Burgard place, Buffalo.
Q. And you are a conductor in the employ of the New York Central?
A. Yes, sir.
Q. Were you a conductor in 1908?
A. I was.
Q. Were you in charge of the movements of the engine and cars that went to make up the train Mr. Kinney was engineer of?
A. Yes, I was.
Q. You got on the engine at East Buffalo on October 12th?
A. Do you mean I got on the engine?
Q. Yes, did you get on the engine?
A. That is where we started from on our first trip.
Q. And then went and got a snow plow and flanger?
A. Yes, sir.
Q. Where did you take them to?
A. To North Tonawanda.
Q. About what time did you start?
A. About two-thirty, if I remember right, something about that time.
Q. And then you left them there and came back to East Buffalo?
A. Yes, sir.
596 Q. And you hooked onto a coal train there?
A. Yes, sir.
Q. And took that coal train to Black Rock?
A. Yes, sir.
Q. Where did you leave it?
A. We left about twelve or thirteen cars on the Elmwood siding.
Q. There is somewhere near the Pierce Automobile plant?
A. A little further down near Military road.
Q. Where did you leave the other cars.
A. Drawing in on what we call the southern track.
Q. That is below Austin street, south of Austin street?

A. That lies west of the main tracks. That is west of the eastbound main tract between tower H and Austin street.

Q. About how many cars did you leave there?

A. I don't just remember how big a train we had that day.

Q. After you left the cars there where did the engine go?

A. Why, the engine was cut off from the train and left at the water plug for a tank of water.

Q. Where did you go?

A. I went to the yard office.

Q. Did any of your crew go with you?

A. Yes, sir, brakeman Boyle went with me.

Q. What did you go to the yard office for?

A. Why, we went to the yard office to see what we were to get back to East Buffalo, and where our train was.

597 Q. What instructions did you get at the yard office?

A. We were instructed to take the engine, go to the southern track, get the caboose, turn around bring the caboose back to Austin street, and put it on the fence track, the rear end of the train.

Q. And did you proceed to do that, or did you give your instructions, or were the instructions given to Boyle?

A. No, the instructions were given to me, and Boyle stood by my side at this time.

Q. Did you take the instructions to Kinney?

A. No, I did not.

Q. Who took them?

A. Mr. Boyle.

Q. And where were you? What did you do?

A. Well, I started out the door with Mr. Boyle, when the yardmaster called me back and started to tell me that he was going to put some cripples on the rear end of the train. In the meantime the engine came up and crossed out, and Boyle got on the engine and they had started to make this movement without me.

Q. In order to turn the engine around they had to make this movement in on the Belt Line track, and then on the Y, and then down back either one of the main tracks to where you were?

A. Yes, sir.

Q. Was that the last time you saw the engine until after the accident?

A. Yes, sir.

Q. At any time during the day and night that you were on that engine did you notice any unusual amount of steam escaping?

598 A. No, sir, I did not.

Q. State whether there is always a little steam escaping from a locomotive, no matter in what good shape *he* is?

A. Yes.

Q. And so that right down to the time——

Mr. Ward: Did you want Mr. Mattern to answer that?

Mr. Spratt: I think he did answer.

Mr. Ward: No, he didn't answer.

The Witness: Did you want me to answer?
Mr. Spratt: Yes.

A. Yes, usually there is a little steam escaping more or less.
Q. And during the whole time you were on that engine up to the time you last saw it just before the accident I think you said there was no noticeable amount of steam escaping?
A. No, I wouldn't say there was.
Q. You wouldn't say there was not?
A. I wouldn't say there was any more than usual, that is, more than any other engine would leak that I noticed.
Q. Assuming that there was steam escaping from the left cylinder and from the belly of the boiler back of the saddle in such quantities that it obstructed the view of the engineer seeing the signals ahead of him, was there any way that that engine could have been operated, drawing its train so that an engineer's view would not be obstructed by the steam?
599 A. Why, yes, he could have backed up to East Buffalo, and not turned the engine; avoided it in that way.
Q. That is, if it was bothering him in looking ahead, and supposing this track he was to get the train from to draw back to East Buffalo—was this the end of the track here (indicating)?
A. Where *we* was to get the train from?
Q. Yes.
A. Yes, it laid over along in here (indicating).
Q. Now, he could have backed up just as he did to tower I, could he?
A. Yes, he could.
Q. And if it was necessary to put the caboose at the rear end of the train, were there tracks here that he could have set it in? (Indicating).
A. Well, if we were to make a movement like that we would just simply shove the caboose, leave it stand right there and couple onto——
Q. And couple onto the train with the cowcatcher of the engine next to the train?
A. Pull the train out and back up.
Q. Pull the train out, and then hook onto your caboose?
A. Yes, sir.
Q. And go to East Buffalo backing up the engine?
A. Yes, sir.
Q. State whether or not that is frequently done in yard movements?
A. Yes, sir.
Q. Did Mr. Kinney make any complaint to you at any time during this day of the engine leaking steam?
600 A. No, sir.
Q. If he had made a complaint, do you know whether the rules of the road provided that he could turn the engine in and take another one, demand another one?

A. Why, yes, he could have did that; refused to take the train out if the engine was not satisfactory to him.

Q. Did he ever make that demand on you or did you ever hear him make that demand on anyone?

A. No, he did not.

Q. Did he, when you reached Black Rock or at any time tell you that the engine was dangerous to run on account of the steam, that he could not see the signals?

A. No, sir.

Q. Did he ever ask you for permission, instead of running the engine forward in the way which he was attempting to do, to run it backwards over to Black Rock and draw the train that way?

A. No, sir.

Q. If he had asked you, would that have been granted?

A. Yes, sir.

Q. What was the first that you knew of the accident?

A. Why, when I saw that they had gone away and left me, I stayed in the office until somebody called the yard-master and told him what occurred at tower 55 about the accident.

Q. Then you went up there, did you?

601 A. Yes, sir, I went down there, then.

Q. And how did you get down?

A. Why, I started to walk down there, and I got down about tower H, and the switch engine came along, the yard engine, and I got on and rode the rest of the way.

Q. And when you got there did you notice the Michigan Central engine?

A. The first thing I took notice of was the train.

Q. The Michigan Central train?

A. Yes, sir.

Q. And what was the condition of that train?

A. Why, the—of course we see the caboose burning up. We thought the train stood a little bit near there. We took and coupled the switch engine on and pulled the Michigan Central train back aways. We found there was one pair of trucks containing three wheels on the head end of the train on the buffet car was off on the ties. That was pulled back far enough so that there would be no danger of its burning up.

Q. Where was the Michigan Central engine? Where did that lay?

A. That laid over on the left side, on the eastward track.

Q. On the eastbound track?

A. On the eastbound track.

Q. Did you notice where Mr. Kinney's engine lay?

A. Yes, Mr. Kinney's engine laid right on the Y track.

Q. Between the tracks or over on the——

602 A. Well, between the tracks.

Q. Was there anything further that you noticel about the situation? Did you notice anything about the lights?

A. Why, the dwarf signal was the only signal that I took notice of.

Q. What was the dwarf? That is, it was dwarf 6, was it?

A. Yes, sir.
Q. What was that?
A. That was set at danger; purple.
Q. That was at purple?
A. Yes, sir.
Q. Mr. Boyle rode down on the engine, did he, from the yard-master's office?
A. Yes, sir.
Q. You saw him get on, did you?
A. Yes, sir.
Q. Did you see him around there when you reached the place?
A. No, I don't think I did.

Mr. Spratt: That is all.

Cross-examination.

By Mr. Ward:

Q. Just a few questions, Mr. Mattern. Do you know what was in that train that you took off the fence track, that you were going to take off?
A. I never took it off. I never got that far.
Q. You got the bills of it, didn't you?
A. Yes, the bills were handed to me.
Q. Those bills would show where every car came from and where it was going to, wouldn't they?
603 A. No, this was an empty train, a train of empty gondolas or empty box cars. I don't believe there was a loaded car in the train.
Q. It would show where they came from, wouldn't it?
A. No, not naturally. They were duplicate slips. When those cars had left East Buffalo for their destination the slip would be torn in two, and they would be turned back as empty cars.
Q. Did you make any examination of those cars?
A. No, sir.
Q. Or any examination of those slips?
A. Simply just to pick them up in my hand for a few minutes until I got this report from tower 55, when I throwed them down on the table, and started.
Q. Do you know where they are?
A. No, sir.
Q. Who did you leave them with?
A. I think I just dropped them down on the desk in the office and left them.
Q. Who decided whether Kinney should back up to East Buffalo or whether he should go forward?
A. Nobody. Well, that is,—I beg your pardon. I meant to say that we received orders what to do. We got orders from the yard-master.
Q. Then that wasn't left to Kinney, was it?
A. No, it was not left to Kinney.

Q. Somebody told him to turn around and run up to East Buffalo, didn't they?

A. The orders were executed to Kinney that the movement was to be made, yes, sir.

604 Q. So that the orders that you got, and which Mr. Boyle heard, were to turn that engine around?

A. Yes, that is right.

Q. And that was Mr. Kinney's business, to carry out those orders, I suppose?

A. No, I wouldn't say as to that. I think that would be left—if Mr. Kinney had said he would sooner back to East Buffalo I think that would have been up to himself.

Q. You were up here at tower H, weren't you?

A. At tower H?

Q. That is where you stayed, or up near there?

A. Up to Austin street, to the office.

Q. When Mr. Kinney got the orders to turn his engine around he was down to tower I, wasn't he?

A. Well, he would start from tower H to go to tower I.

Q. You don't know where he got the orders to turn the engine around?

A. I presume he got the orders when Mr. Boyle got on the engine.

Q. You don't know where he gave him those orders?

A. No, sir.

Q. It was after the whole thing was over that you came back down there?

A. Yes, sir.

Q. Was Mr. Kinney's tender tipped over?

A. Yes, the tender wasn't tipped way over. It kind of laid partly tipped over. I would call it partly tipped over.

605 Q. Where did his engine lay?

A. The engine laid over on the—if I remember right, it laid on the eastward and probably over on the westward track of the Y.

Q. Coal dumped out of the tender?

A. Well, I don't know whether there was any of it dumped out. There was a lot of coal inside of the engine. I don't know how much was dumped out.

Q. The other engine had tipped over in the opposite direction?

A. Yes, sir.

Q. I suppose by the time you got there there had been a lot of people there?

A. No, I don't think there had so many got there at that time. A little later there was a lot of people got there.

Q. Quite a number there then?

A. When I got down there, I don't just remember—after I got inside of the engine and was in there a few minutes, the firemen were the first to come if I remember right.

Q. The first one that you saw?

A. Yes, sir.

Q. After this thing happened you came from Austin street here (indicating), didn't you?

A. Yes, sir.

Q. The first thing you did was to look onto this train and pull it back?

A. Yes, sir.

Q. Then after you had done that you walked up to the place?

A. Walked up to where?

606 Q. To the place of the accident?

A. Yes, sir.

Q. Mr. Kinney, I suppose, was still laying there?

A. Yes, Mr. Kinney was laying down in between the two——

Q. Did you make some effort to assist him?

A. I did.

Q. Was that the first thing you did?

A. That was the first thing I did after pulling the train back.

Q. Did you go and look at this dwarf first or did you go and help Mr. Kinney first?

A. I had to pass this dwarf six as I went down there.

Q. What were you thinking about then, the dwarf or Mr. Kinney?

A. I couldn't tell you just what I was thinking about at that time.

Q. Was this dwarf back of the caboose, back of the tender?

A. Yes, sir.

Q. It was back of the tender?

A. Yes, sir.

Q. Very close to the tender, wasn't it?

A. If I remember right it was.

Q. Are you sure you saw it?

A. Yes, I am sure I saw it.

Q. You know how those dwarfs are fixed, don't you?

A. Yes, sir.

Q. Supposing that dwarf had stood at green and somebody had got on those wires after the accident, what would it do to the dwarf?

607 A. Well, if it was working properly it would go to danger.

Q. Go to purple, wouldn't it?

A. Yes, sir.

Q. When did you get up into the tower, Mr. Mattern?

A. I should think just before the wrecking train arrived there. I think I stayed in the engine or around about the engine until I heard that the wrecking train had arrived.

Q. Did you see Boyle and Mullen up in the tower making statements?

A. I believe they were there.

Q. Signing papers, weren't they?

A. The Superintendent was there and asked for a statement, yes, sir.

Q. He was writing it out?

A. Yes, sir.

Q. And they were signing it?
A. I presume they signed it.
Q. Did you sign one too?
A. Yes, sir.
Q. Right there?
A. Yes, sir.
Q. That was before the wrecker got there?
A. After the wrecker got there.
Q. Was it while Kinney was still down under the coal?
A. Yes, sir.
Q. This gentleman that was so prompt in taking the statements of you three men, he was the Superintendent of the New York Central, was he?
A. Yes, sir, at that time.
608 Q. And he had been at attorney at one time, hadn't he?
A. I believe that was the rumor.
Q. After you and Mr. Boyle and Mr. Mullen told your story, nobody blamed any of you fellows, did they? You never got blamed, did you?
A. No, sir, I guess not.
Q. You got promoted, didn't you?
A. Shortly after. That is, when it came my turn for promotion I was promoted.
Q. And you are still with the company?
A. Yes, sir.
Q. A passenger conductor now, aren't you?
A. Passenger and freight. Back on freight again.
Q. Mullen, he got promoted, didn't he?
A. I believe so.
Q. Boyle got promoted?
A. Boyle was promoted too.
Q. What did they do with Kinney?

Mr. Spratt: I object to that as incompetent and immaterial. What Kinney has done is here in court.

Q. What did they do with Kinney that night, take him to the hospital, did they?
A. Yes, sir, Mr. Kinney was taken to the hospital.
Q. They didn't take his satement?
A. No, sir.
Q. That was a sort of a one-sided trial that they were holding up there in the tower?

Mr. Spratt: I object to it as incompetent and immaterial.
The Court: Yes.

609 Redirect examination.

By Mr. Spratt:

Q. Do you know that they have to make promptly a report to the Public Service Commission after an accident happens?

A. Yes, sir.
Q. And the Public Service Commission investigates?
A. Yes, sir.
Q. And what did you do to help Mr. Kinney?
A. Why, I saw there was no help for him until the wrecking train arrived. When the firemen got there we placed some jacks in the side of the tender, and started to see if we couldn't get him out, but the jacks after a certain—after we would pry just so much they would slip out, and the tender would settle—seem to settle still more.
Q. Did you pull the coal away?
A. Well, no, I think when I got in the engine I think he complained of something hurting his back and I kind of reached under and kind of smoothed it out a little bit. There was chunks there. If I remember right there was water running on him, and I plugged that up, and after I plugged that up he asked me to let it run again, which I did.
Q. When the firemen came there they took charge, did they?
A. The wrecking outfit?
Q. The city firemen came there, did they?
A. Yes, sir, the city firemen. They tried to—they even sawed the grabhandle, thinking that would relieve him, and as they sawed that it settled on still more instead of relieving him. We couldn't do anything toward getting him out until the wrecking outfit arrived to lift the train up.
610 Q. So that you were doing everything you could to help him?
A. Yes, sir.
Q. Then the wrecking outfit came, did they?
A. Yes, sir.
Q. With their gang of men?
A. Yes, sir, they have a gang of men and a large derrick.
Q. And they are supposed to be expert in that kind of work?
A. Yes, sir.
Q. When they came they took charge of the job, did they?
A. They took charge of the job immediately.
Q. And was it after that that you went up to the tower to talk with Mr. McEwen?
A. Yes, sir, it was after the accident.
Q. And he wanted to know how it happened?
A. Yes, sir, we gave him our statements.
Q. That was the time after the wrecking crew came there that the superintendent was there, and Boyle and Mullen were up there?
A. Yes, sir.
Q. And he was asking how the accident happened?
A. Yes, sir.
Q. When I asked you before about Boyle going up on the engine, that was Kinney's engine, that was the engine Kinney was operating?
A. Yes, sir, that was Kinney's engine.
Q. With reference to his running his engine forward or back-

ward, was that a matter that was entirely in the control of the engineer?

611 A. Yes, sir, that would have been up to the engineer. Even if the yardmaster gave him orders to turn that engine, and he saw he ought not to turn it in those conditions, he wouldn't have had to turn it, it would have been up to himself.

Q. The question of safety, that was entirely in his power.

A. Yes, sir, that was in his power.

Q. He need not have turned it if he wanted to, and he need not have used it if he wanted to?

A. Yes, sir.

Mr. Ward: I object to that and ask that it be stricken out.

The Court: I will let it stand.

Q. The counsel has asked you if you were promoted sometime after this accident. State whether or not your promotion was in regular turn?

A. It was in regular turn, yes, sir.

Q. That is, by seniority?

A. Yes, sir, according to my age and service.

Q. Were you jumped ahead of anybody or anything at all? It was simply in the ordinary course?

A. Simply in the ordinary course.

Q. Do you know how it was with the other men?

A. I presume they were promoted in the same way.

Q. You belong to the brotherhood, I assume.

A. Yes, sir, I do.

Q. And these other men also.

A. I couldn't say as to that, whether they belong or not.

612 Q. Is there an arrangement between the Brotherhood and the railroad by which promotion is according to age and service?

A. That wouldn't matter, whether you were a Brotherhood man or not. If you were of age for service you would be promoted.

Recross-examination.

By Mr. Ward:

Q. Did you see anything about that engine while you were traveling on it that would justify the engineer turning it in or refusing to operate it?

A. No, because I didn't——

Q. You can answer that question. Did you see anything about that engine while you were riding on it that would justify the engineer in turning it in or refusing to ride on it?

A. Well, Mr. Ward, I didn't ride on the engine that day.

Q. Haven't you testified here on your direct examination that you were on the engine?

A. I don't think so.

Q. Did you ride on it at any time?

A. I don't remember being on the engine, no, sir.
Q. Didn't you testify in answer to Mr. Spratt's question that the engine was only leaking a small amount of steam?
A. Yes, sir, I did.
Q. Where did you find that out?
A. Why, from observation.
Q. Did the observation that you made lead you to believe that it was leaking so much steam that the engineer ought to turn it in?
613 A. No, sir.

Mr. Ward: That is all.
Mr. Spratt: That is all.

JOHN J. MULLEN was duly sworn as a witness in behalf of the defendant.

Direct examination.

By Mr. Spratt:

Q. Mr. Mullen, you live in Syracuse?
A. Yes, sir.
Q. And you are in the employ of the New York Central?
A. Yes, sir.
Q. In what capacity?
A. Why, as brakeman at the present time.
Q. Were you brakeman in the employ of the company on October 12th, 1908?
A. Yes, sir.
Q. And you are a member of the crew of which Kinney was the engineer?
A. Yes, sir.
Q. Had you ever known Kinney before that day?
A. No, sir.
Q. Had you ever worked with him before that day?
A. No, sir.
Q. Where did you meet him first that day?
A. Why, if I remember right the first time I saw him was when his engine backed down onto the train.
614 Q. And that train consisted of what?
A. Why, a couple of flangers and a snow plow and a caboose.
Q. They were taken to Tonawanda?
A. Yes, sir, we got them in what is known as the shop yard and taken them to Tonawanda.
Q. And then from Tonawanda you returned with the caboose and the engine?
A. Yes, sir.
Q. To East Buffalo?
A. Yes, sir.
Q. And there you hooked onto what train?

A. Why, we turned the engine at East Buffalo, and then we went down to what is known as the Y yard, and got a train for Black Rock.

Q. What did that train consist of—mixed?

A. It was a mixed train of coal, iron, steel, lumber and the like of that.

Q. Where did you take that train to?

A. To Black Rock.

Q. Did you leave any part of it at Elmwood?

A. Yes, we left some cars on what is known as the town siding at Elmwood avenue.

Q. And you left the balance of it where?

A. On the southern track.

Q. After you uncoupled from the train on the southern track what was the next move of your engine?

A. The engine came from the head end of the train back to the rear end, and nosed in on the caboose. We backed out and down to Military road.

Q. What did you do then?

A. Why, there was some—if I remember right there was some talk between engineer Kinney and the towerman in regard
615 to what track we would go over.

Q. Did you take any water in at the tower?

A. How is that?

Q. Did you get any water at the water tower down there? Do you recall that?

A. Not down there. They got water down on the southern where they pull in on the southern at Black Rock.

Q. Did Mr. Boyle come on your engine?

A. Mr. Boyle and I were together from the time we left Black Rock—that is, from the time the engine nosed in on the caboose on the southern until we arrived at tower I.

Q. Do you remember of his going with the conductor to the yard office?

A. I don't know. I was on the rear end of the train. He was on the head end.

Q. Before you made the movement around to tower I was Boyle with you?

A. Yes, sir.

Q. And then when you moved around to tower I did your engine back up?

A. Yes, sir.

Q. And the caboose was where the cowcatcher——

A. At the head of the engine.

Q. When you got to tower I will you tell what occurred?

A. Well, when we got to tower I there was some talk, as I say between engineer Kinney and the towerman in regard to what track they would go on, and Mr. Boyle and myself went
616 down to throw some crossover switches.

Q. Here is tower I here on this map (indicating). You have seen this map. It has been used on the other trials. Tere i

the Military road (indicating). Where were those switches with reference——

A. The switches were down in here somewhere (indicating).

Q. South of the Military road?

A. Yes, sir.

Q. And you were throwing switches to bring you in on what track?

A. We were going to throw switches to bring us over on this track (indicating).

Q. That is on the Y with the current of traffic?

A. With the current of traffic over to tower 55.

Q. When you were doing that work what happened?

A. Well, engineer Kinney hollered to us to come on, that the towerman said it was all right to go over on the other track against the current of traffic.

Q. Then what did you and Boyle do?

A. I hollered to Boyle to close up—I says, "Come on, Bob, the engineer says it is all right to go over on this other track."

Q. Was he a little further south than you?

A. Yes, or east. I don't know what direction you would call it.

Q. A little east? About how much further east?

A. Oh, I don't know. A matter of 30 feet; something
617 like that. I don't remember the exact distance.

Q. Then what did you both do after he told you?

A. Well, we closed up our switches, those hand switches that we had already throwed, and I went ahead and got on the forward end of the caboose.

Q. Did you notice Boyle?

A. I noticed Boyle behind me.

Q. Could you tell whether he got on the engine or what part of the engine he got on?

A. I don't know whether he got on the engine or not, but I know he was walking towards the engine the last I seen of him.

Q. Was it dark?

A. Yes, sir.

Q. You went forward and got on the forward end of the caboose?

A. Yes, sir.

Q. And now tell what you did from that time on up to the time the accident happened.

A. When I got on the forward end of the caboose engineer Kinney had started up and I—well, when I got on the forward end of the caboose I rearranged my markers first.

Q. What are the markers?

A. The markers are the tail lights set up in a bracket on the end of the caboose.

Q. You say you re-arranged them?

A. Yes, sir.

Q. What color were they?

A. They were red and I turned them to green.

Q. Is that the proper condition of light for the markers in making that movement?

618 A. For making that movement, yes, sir.

Q. That is, the caboose was to the rear before and now it was going forward, the movement you were to make?

A. Yes, that is right. I had them arranged for a rear end, and I changed them, and shoving around there it would be green.

Q. Go on and tell what you next did.

A. I had a red light in there, and I got it and brought it to the forward end of the caboose, and reached out and give engineer Kinney a come ahead signal.

Q. You say you brought it to the forward end of the caboose. Did you bring it out to the platform?

A. No, sir.

Q. Where did you put it?

A. Just inside the door.

Q. Was that the proper place to put it—to keep it?

A. No, sir.

Q. Green lights were the proper lights to have out, were they?

A. Yes, sir.

Q. What was the next thing you did?

A. I gave him a come ahead signal.

Q. About where were you at that time?

A. Oh, we were somewheres in front of tower I. I don't know just exactly where, but it was somewhere in that vicinity.

Q. Then go on and tell what other signals you gave.

A. Well, we proceeded around there, proceeded around on
619 this track here (indicating) against the current of traffic towards tower 55, and when we come to—the next signal I gave him was when we was approaching Hertel avenue here (indicating).

Q. What signal was that?

A. I gave him a come ahead easy signal then.

Q. What was the next signal you gave him after that, and where did you give it?

A. The next signal I gave him was after crossing Hertel avenue. I gave him another easy signal.

Q. That was after you had crossed Hertel avenue?

A. Yes, sir.

Q. About how far?

A. About a car length, that is 40 feet—based on a 40 foot car.

Q. What was the next signal you gave him?

A. The next signal I remember giving him was a stop signal.

Q. And why did you give him the stop signal?

A. Well, I had noticed that the dwarf was against us.

Q. What do you mean? What was the color that it displayed?

A. Purple.

Q. And about how many car lengths from the dwarf were you at that time?

A. Five or six.

Q. Go on and tell what other signals you gave.

A. That is all the signals I give him that I remember—the stop signal. I continued to give him the stop signal.

Q. Did you continue to give him the stop signal?

A. Yes, sir.
Q. Did you assume that he would stop at the dwarf?
A. I fully expected him to, yes, sir.
Q. When he didn't stop at the dwarf—when you saw he wasn't opping for the dwarf, did you make any further investigation to the dwarf?
A. Yes, sir.
Q. What did you do?
A. I held my lamp down to make sure—looked at the arm—e what the position of the arm was.
Q. What was the position of the arm?
A. That was in a horizontal position.
Q. Was that the proper position for it to be, the light being urple?
A. Yes, sir. Stop position.
Q. What did you do then?
A. Well, I looked up at the high signals, and I saw that there as a clear block for Michigan 3, that is Michigan Central No. 3.
Q. That was up high, was it, this light?
A. Yes, sir.
Q. And you could see it?
A. Yes, sir.
Q. And that was clear you say, for the westbound track?
A. That was clear for the westbound track.
Q. What did you do then?
A. I began to realize that something was about to occur then, nd I jumped off.
Q. From the time you began to give these signals, what position were you on the car?
A. I was on the forward end of the caboose.
Q. And where were you standing, in what way?
A. I had my back up agin the corner of the caboose and my feet vas on the end sill that runs across there.
Q. Did the sill run out flush with the side of the car?
A. Yes, sir.
Q. And the steps were cut in?
A. The steps was cut in, yes, sir. Here (indicating) is the end ill, and here (indicating) is the back of the caboose. The steps vas down here (indicating).
Q. About where was your shoulder?
A. My shoulder was outside the caboose, the right hand corner.
Q. You say you gave an easy come ahead signal. Here is a lantern (handing lantern to witness). Will you show to the jury, assuming as you are standing here and that this rail (indicating) was the edge of the caboose——
A. What do you want?
Q. A come ahead slow signal.
A. That is the position(illustrating with lantern).
Q. That is, you use a wrist movement?
A. A wrist movement, yes, sir.

Q. Is it vertical, up and down? Does the light show up and down (indicating)?

A. That is the intention. The intention is that at night the light will be in an up and down (indicating).

Q. Is the movement of the light as it appears at night up and down?

622 A. Yes, sir.

Q. Vertical?

A. Yes, sir.

Q. The witness indicates, holds his hand out, right arm about even with shoulder, and makes a motion, a movement with his wrist up and down of about 18 inches, would you say?

A. I don't know just what it would be.

Mr. Ward: The light does not hang from his hand. It extends out from his hand. Put that on the record, will you, Mr. Spratt?

Mr. Spratt: He holds the bale so that it extends out.

Q. That whole movement, state whether that was outside of the side of the caboose?

A. Yes, sir, it was.

Q. And the whole movement—was there any arc in the movement at all so far as the light was concerned?

A. Was there any what?

Q. Any arc? Was there any swing?

A. No, sir.

Q. Are you familiar with the rule of the company as to the vertical light?

A. Generally, yes.

Q. The rule says, "Proceed signal, raised and lowered vertically." Did you raise the light on this occasion?

A. When you are giving that signal you carry that into effect.

Q. The light itself is raised and lowered vertically?

A. Raised and lowered, yes, sir, (indicating).

623 Q. You have described how you gave the stop signal. Now, will you illustrate with the lamp the kind of a signal you gave on that occasion?

A. Well, where is the engineer?

Q. Assume the engineer is back here (indicating). I guess you will have to stand down here probably to swing it. If you stand right down here and assume that the engineer is back there where the man is with a glass of water (indicating), and assume that the rail here (indicating), is the corner of the box car.

A. This here position that I assume like that (indicating), here is the end sill along here (witness indicates with his feet), and here is the brake wheel here indicating).

Q. Now, you give the same kind of a stop signal you gave that night.

A. (Witness illustrates with lantern.)

Mr. Spratt: Witness swings out about——

Mr. Ward: From his knee to the height of his shoulder, doesn't he?

Mr. Spratt: Nearly. Not quite to the height of his shoulder.
Mr. Ward: Swings across his knees on the downward movement?
Mr. Spratt: Yes, swings across his knees on the downward movement.
Mr. Ward: Swinging it out at arm's length nearly to the height of the shoulder.

Q. Is that it?
A. Yes, only that I don't bring it across my knees (illustrating).
Mr. Spratt: It swings about from the shoulder down to
624 and somewhat across his right knee. That is about it, isn't it?
Q. Is that a horizontal movement that you made?
A. That is a stop signal, yes, sir.
Q. State whether the dwarf signal changed from purple, from the first time you saw it, to green?
A. No, sir, it had not.
Q. Was it purple all the time from the time you saw it in the vicinity of Hertel avenue?

Mr. Ward: He didn't say the vicinity of Hertel avenue. He said 5 or 6 car lengths from the dwarf.

Q. How far from Hertel avenue were you when you first saw the dwarf?
A. 5 or 6 car lengths. Something like that.
Q. Was that the point where you first could see it?
A. Oh, no. I saw it before we—I saw it after we got about a car length over Hertel avenue.
Q. When you got over Hertel Avenue, that was the place where you first saw it?
A. Yes, sir.
Q. Is that the place where you could first see it?
A. Yes, sir.

Mr. Ward: I object to that, what he could do and couldn't do.

Q. Was there anything to obstruct your view before that?
A. None,——
Q. I meant before you got to that point where you first
625 saw it. Was there an embankment there?
A. Well, there was the curve there.
Q. After the curve and when you got in the vicinity of Hertel avenue you say that was the place where you could first see it?
A. Yes, sir.
Q. Were you looking for it?
A. Yes, that was my objective point.
Q. Was it in your view from that time on until you passed it?
A. Yes, sir.
Q. Did it change at all?
A. No, sir.
Q. Now, the stop signals that you said you have, were they given crosswise of the track? Did it indicate crosswise of the track?

A. Of the track that we were running on?
Q. Yes.
A. No, sir.
Q. I meant if you had extended it would it be across the track or would it cross the track?
A. If I swung it in front of me it would have been across the track.
Q. But you swung it out from the side of the car?
A. Yes, sir.

Mr. Ward: I object to that as leading.
The Court: Yes. We saw him swinging it here.
Mr. Spratt: I wanted to get it on the record.

Q. Did you swing it out from the side of the car?
626 A. Yes, sir.
Q. Was it a horizontal swing?
A. Yes, sir.
Q. Will engines in the best of condition, will there be a little steam escape?
A. Yes, there is generally a little steam escaping from all of them. They have to be pretty tight.
Q. During all the time you were with Mr. Kinney on this day was there any unusual amount of steam escaping from that engine?
A. Not that I can recall.
Q. Did Mr. Kinney ever make any complaint during that day about the steam obstructing his view?
A. Not to me he hadn't.
Q. Did you see any steam escaping that day that would obstruct his view of signals?
A. Not that I remember of.
Q. Well, would you remember if it did?
A. Well, I hardly know whether I would or not.
Q. After the accident what did you do?
A. Why, when I picked myself up—I laid in the ditch there for a short while and I picked myself up and I looked around and all I could see was steam. So that I went up towards the tower, tower 55, went up in the tower and told the towerman to send for the ambulance and steam crane.
Q. After that what did you do?
A. I came down and circled around, and got over by Kam's malt house and got in our engine. I found Mr. Kinney laying there partly covered over with coal.
627 Q. What did you do?
A. And I helped to pull some of the coal off of him, eased up his head a little bit, helped him all I possibly could until there was other men had arrived there, and I left there. After doing all I could for him I left there.
Q. Where did you go then?
A. I just stayed right around in there.
Q. You stayed right there? Do you remember the firemen coming there?

A. Yes, sir.
Q. And they cut a little of the engine off there, the handle?
A. Why, I remember now of some jacks and things there. The men were trying to jack the engine up, jack the tender off of him so as to get him out of there.
Q. They weren't successful in that?
A. No, sir.
Q. Then do you remember the wrecking crew coming there?
A. Yes, I was right in around the engine until the arrival of the wrecking crew.
Q. Then the wrecking crew took charge of it?
A. Yes, sir.
Q. Was it some time after that you went up to the tower again?
A. Somebody came down and told me I was wanted up in the tower.
Q. The superintendent was there?
A. Superintendent McEwen, yes, sir.
Q. Did he ask you how the accident happened?
A. Yes, sir.
Q. And you gave him a statement?
628 A. I gave a detailed statement there, yes, sir.
Q. You knew there had to be a report made to the Public Service Commission about the accident?
A. I didn't know anything about the Public Service Commission whatever. He asked me how the accident occurred and all the particulars leading up to it, and I told him.
Q. If the engine was leaking steam out of the left piston, out of the belly of the boiler, in such position as affected the ability of the engineer to see the signals, was there any way that that engine, under those conditions, could be attached to the train and brought to East Buffalo, so that the escaping steam would not affect the view of the signals?
A. Yes, sir, there were.
Q. How could that be done?
A. In place of turning the engine he could have backed up to East Buffalo, nosed in on his train and pulled it back to East Buffalo. That is by backing her. That would leave all the steam in the forward end of the engine.
Q. It was brought out by the previous witness that some time after this accident you received promotion. Do you remember how long after the accident it was—or did you receive any promotion?
A. Did I receive promotion?
Q. Yes, after the accident?
A. I could have had promotion twice, but I refused it. I finally took it a year ago.
Q. Did the promotion come to you in the regular way?
629 A. It came to me according to seniority. We have the privilege of taking it or not.
Q. Were you jumped ahead at all over——
A. Yes, I was jumped about 75 men.
Q. When was that?

A. Well, when they first advertised for them it was in 1912. Those were put up on a bulletin board on an advertised list.

Q. This accident happened in 1908. You weren't offered promotion until when?

A. The first opportunity I had to take promotion was in 1912. That was four years after the accident. Then I refused it again in 1913, and finally took it in 1918.

Q. After Mr. Kinney was given the right to proceed on this track against the current of traffic could he go up as far as the dwarf signal without stopping?

A. Yes, sir.

Q. Was that his right?

A. Yes, sir.

Q. But when you got to the dwarf signal if it was purple then you had to stop?

A. Yes, sir.

Q. Did you believe that Mr. Kinney would stop when he got to the dwarf?

A. I fully expected him to, yes, sir.

Q. As you saw that he wasn't going to stop at the dwarf, or didn't stop at the dwarf, did you change the speed of your signals in any way?

A. Yes, as we approached the dwarf I swung it more rapidly.

Q. More rapidly in what way?

A. Stop signal.

630 Q. About how long did you keep up that rapid movement?

A. Until we got up to the dwarf.

Q. And by it?

A. I changed it then and looked down at the dwarf, held the lamp down at the dwarf to ascertain the position of the arm.

Q. And then after that what did you do?

A. I started to give him a stop signal again.

Q. Was it slow or rapid?

A. Rapid.

Mr. Spratt: That is all.

Cross-examination.

By Mr. Ward:

Q. Mr. Mullen, you have worked for the New York Central for how many years?

A. Twelve years.

Q. You were an experienced brakeman at the time this thing happened?

A. Yes, sir.

Q. And as a result of it you were not punished or suspended or anything?

A. No, sir.

Q. You cleared yourself all right?

A. I didn't have anything to clear, Mr. Ward.

Q. No, of course not. But you were cleared?
A. Yes, sir.
Q. I won't say you cleared yourself. You were cleared?
A. Yes, sir.
Q. You told your story to Mr. McEwen up there in the tower while Kinney was down under the engine yet, didn't you?
631 A. Why, I can't recall that I did. Now I am not quite sure, but I think the wrecking train had arrived there by that time, the time that I made the statement to Mr. McEwen.
Q. It was that night?
A. Yes, sir.
Q. Of course you knew the purpose of putting a brakeman on the front end of a car, didn't you, Mr. Mullen?
A. Yes, sir.
Q. And that purpose was to be the eyes of the engineer?
A. So to speak, yes.
Q. You were in a better position to see the position of fixed signals than he was?
A. Yes, sir.
Q. And also to observe any obstructions on the track?
A. Yes, sir.
Q. And in ordinary practice when an engineer is pushing a car with a competent brakeman on the head end of it, the engineer operates his engine in accordance with the signals of the head end brakeman?

Mr. Spratt: That I object to. He can't testify for the engineer. The rules govern and he hasn't any right to testify as to what he does.
The Court: He can only tell what he knows about it. I will let him tell if he knows.

Q. You may answer, the court says.
A. That would all depend on circumstances.
632 Mr. Ward: Just read the question again. You have answered that question before.

(Question read.)

A. Yes, sir.
Q. That is so, isn't it?
A. Yes.
Q. So that you realize when you were on the head end of that caboose there that, generally speaking, you were in command of the movement?
A. Yes, sir.
Q. Now, you are provided with both a red and white light, aren't you, Mr. Mullen?
A. Yes, sir.
Q. And the white light is the ordinary means of giving signals to the train crew?
A. Yes, sir.

Q. You used the red light in case of signaling other trains and in cases of emergencies?

A. Flagging purposes, yes, sir.

Q. You and Mr. Boyle had passed over the highway to set some switches at Tower "I", hadn't you?

A. Yes, sir.

Q. The last you saw of Mr. Boyle he was still south of the Military road, and going up toward the north, or—well, along the general direction of the track?

A. The last I saw of Mr. Boyle he was walking toward the engine.

Q. He was also walking towards everything else that was in front of him, wasn't he?

A. Well, the engine was his objective point.

Q. Did you see him get on the engine?

633 A. No, sir.

Q. Did you afterwards see him on the engine?

A. At the time of the accident.

Q. Did you ever afterwards see him on that engine?

A. Before the accident?

Q. Yes.

A. Not before the accident.

Q. Did you see him get on the engine?

A. No, sir.

Q. So that when you left Mr. Boyle he was walking in the general direction of the engine?

A. Yes, sir.

Q. And so were you?

A. Yes, sir.

Q. He was behind you somewhere?

A. Yes, sir.

Q. And he was also walking in the general direction of Tower "I", wasn't he?

A. Yes, sir.

Q. And also walking in the general direction of this train that you were to take off the fence track?

A. No, sir.

Q. You wouldn't say that? That was beyond Tower "I", wasn't it?

A. Yes, sir.

Q. And you got up on the caboose?

A. Yes, sir.

Q. Mr. Boyle didn't get up there, did he?

A. No, sir.

Q. You were alone on the caboose during the movement?

A. Yes, sir.

634 Q. You took the red lantern and got it out where you could reach it handy if you needed —?

A. Yes, sir.

Q. And all the rest of the time that red lantern was within two or three feet of your hand?

A. Oh, I couldn't say how many feet it was.

Q. Well, close to your hand?

A. It was inside the caboose.
Q. Close to your hand, wasn't it?
A. Well, I would have had to go inside the caboose in order to get it.
Q. You didn't get it at any time, did you?
A. No, sir.
Q. Having in mind that you were there to observe signals and transmit their position to the engineer, I suppose you knew that it was all right for you to go up as far as dwarf 6 anyhow, didn't you?
A. Yes, sir.
Q. No matter what the position of the signal was it was all right for you to go up that far?
A. Yes, sir.
Q. And I suppose the first thing you had to look after was Hertel avenue?
A. Yes, sir.
Q. See that you didn't run over anybody?
A. Yes, sir.
Q. Because whether you were to go out on the main track or not, anyhow you were to go across Hertel avenue, weren't you?
A. Yes, sir.
Q. The first time that you observed that dwarf signal was how far from the dwarf signal?
635 A. Well, it was about 40 feet after we crossed Hertel avenue.
Q. On your direct examination when you first answered Mr. Spratt's question this afternoon you said it was when you were 5 or 6 car lengths from the dwarf, didn't you?
A. I don't believe I did.
Q. You didn't mean to say that?
A. If I said it I didn't mean to.
Q. And then did you say in answer to a certain question of Mr. Spratt's, that when you were a car length past Hertel avenue?
A. Yes, sir.
Q. What do you say now?
A. I say that when we was a car length past Hertel avenue?
Q. Was that the first time you saw it?
A. Yes, sir.
Q. Was there anything to prevent your having seen it before that?
A. Why, I don't know. I don't think a man could see it until he got there.
Q. There is nothing in the way, is there?
A. Well, there is the condition of the track and surroundings there.
Q. There are no buildings in the way?
A. There was a tool house along there.
Q. Where was the tool house?
A. I don't remember just where the tool house was, but it was somewhere between tower "I" and Hertel avenue.
Q. From a point 4 or 5 car lengths south of Hertel avenue up to that dwarf there is a slight curve of that track?

636 A. There is a pretty heavy curve.

Q. Well, about the course shown on the map, isn't there?

A. Yes, sir.

Q. You looked across the inside of the curve toward that dwarf, don't you?

A. Yes.

Q. Can you tell this jury of a single thing that would prevent you seeing that dwarf from a point two car lengths away before you got to Hertel avenue?

A. Why, I don't know the reason why I couldn't see it, but I know that it couldn't be seen. It was too far away for one thing.

Q. You mean you didn't see it, don't you?

A. I didn't see it until we crossed Hertel avenue, no, sir.

Q. As a matter of fact, wasn't the first that you saw of that dwarf when you were 5 or 6 car lengths from Hertel avenue?

A. No, sir.

Q. Haven't you so sworn repeatedly?

A. I dont believe I have.

Q. On the various trials of this action?

A. I don't believe I have.

Q. Let me call your attention to the questions that I asked you on the last trial, page 605: "Q. Now, when you made the statement down in the Claim Agent's office to the Public Service Commission did you tell them with the facts fresh in your mind: 'Trainman Mullen says that he rode on the platform in front of the caboose and when about 5 or 6 lengths from dwarf signal noticed the
637 signal was against them, and he swung up Kinney with his white hand lantern'? Is that what you stated then?"

A. I never made——

Q. Wait. Let me see. And did you answer—you are following me, aren't you?

A. Yes, sir.

Q. (Reading:) "A. I don't know what I did state to the Claim Agent. He has got that all twisted and garbled up in every way. He has got a lot of stuff in there that I never stated there." And then were you asked: "Q. You have been asked about that on other trials, haven't you?" And did you say "A. Yes, sir"? And were you asked: "Q. And you have had opportunity to explain it on other trials?" And did you answer: "A. And I have had disputes on it too"? And I call your attention to the testimony on the trial of the action before Justice Pooley, page 376 (showing testimony to witness). Then did I ask you the question: "Some time after the accident, Mr. Mullen, did you say down in the Claim Agent's office (we will limit it to that) that you rode on the platform in front of the caboose for about five or six car lengths from the dwarf signal and you noticed that the signal was against them"? Did you say that? And did you answer: "A. I don't remember what I did tell the Claim Agent. I would deny that I said five or six car lengths, but I said six or seven car lengths." "Didn't you swear to that on the third trial of the action?" And did you answer: "I be-
638 lieve I did. If it is on there." And then did I ask you: "Did you understand it then?" And did you answer: "Well, that

would make it right, wouldn't it?" And then did I say: "Do you say it now that when you first noticed the signal was purple you were six or seven car lengths from the dwarf?" And did you answer: "Yes, that would make it right."

Is that what you swore to on the last trial, Mr. Mullen?

A. Yes, sir.

Q. Is that true?

A. Yes, sir. Six or seven car lengths is not five or six.

Q. And it isn't a car length from Hertel avenue either, Mr. Mullen. Now, let me show you this book of rules, Mr. Mullen. (Showing book to witness.) You are familiar with the exhibit in the book of rules which shows how to give signals according to the book, aren't you, Mr. Mullen?

A. According to the book, yes, sir.

Q. Will you give us a proceed signal, as it is given according to the book?

A. That is the length of it (illustrating).

Q. Will you give it to us as it is given in the book?

A. That there diagram is like that (indicating).

Q. That is the way it is given in the book, isn't it?

A. Yes, sir.

Q. Is that the way you gave it to Kinney?

A. No, sir.

639 Q. You stood with your back up against the caboose all that distance, didn't you?

A. Yes, sir.

Q. You knew Mr. Kinney was on the other end?

A. Yes, sir.

Q. And you knew that all he could see of your signal was what appeared outside the line of the caboose? You knew that?

A. I knew he could get a clear view of my signal outside the line of the caboose, yes, sir.

Q. That is, he couldn't see anything that wasn't outside the line of the caboose, could he?

A. No, sir.

Q. Did you have that in mind all the time or did you forget it for the moment?

A. No, sir, I didn't forget it.

Q. You had it in mind all the time?

A. Yes, sir.

Q. When you came down to within 6 or 7 car lengths of this dwarf it was perfectly plain to you that that dwarf was set against the movement, wasn't it?

A. Yes, sir.

Q. And you knew that you were there to stop it?

A. Yes, sir.

Q. And you didn't think for a minute that Mr. Kinney would run by the dwarf, did you?

A. No, sir, I fully expected Mr. Kinney to stop.

Q. But you knew it was your duty to stop him?

A. Yes, sir.

640 Q. That is what you were there for?

A. I was trying to.
Q. And so you gave him a stop signal?
A. Yes, sir.
Q. You were out about how many feet ahead of Mr. Kinney in that movement?
A. Why, I couldn't state exactly. The caboose was about 30 foot long. How long the engine is I don't know.
Q. I think there has been something said here about 35 feet for the caboose and 40 feet from Kinney to the front end of the engine. Would that be your judgment about it?
A. The caboose is listed at 30 feet, I think, I am not sure, and the engine from the cab to the forward end of the caboose I judge about 20 foot more, something like that.
Q. You are not serious about that? What is the whole length of that locomotive boiler from the cab clear to the front of it? 20 feet, in the experience of a railroad man?
A. I guess it is more than that.

Mr. Ward: Didn't we stipulate it was 40?
Mr. Spratt: I think it is 36 feet.
Mr. Ward: I will take that, whatever you say. What did you say the caboose was, Mr. Spratt?
Mr. Spratt: They have always talked about it as 30 feet, as I recall it.
Mr. Ward: We will take it 30.

Q. So that you were 30 feet and 36 feet, which is 66 feet, out ahead of Kinney, weren't you?
641 A. Yes, sir.
Q. You got to the dwarf that much quicker, didn't you?
A. Yes, sir.
Q. When you got to the dwarf, if it had stopped there there wouldn't have been anybody hurt?
A. No, sir.
Q. Mr. Kinney didn't have any business to push you by the dwarf if the signal was against him and he knew it, did he?
A. Not if he knew it.
Q. That is, he was not supposed to run his engine up to the dwarf? He was supposed to stop before you got by the dwarf, wasn't he?
A. Yes, sir.
Q. So that you knew there was something wrong the minute you passed the dwarf, didn't you?
A. Yes, sir.
Q. You knew that?
A. Yes, sir.
Q. And you stayed up there on the platform until you jumped off, didn't you?
A. Yes, sir.
Q. You were sure that that dwarf was purple, weren't you, Mr. Mullen?
A. Yes, sir.

Q. Yet when you got to it you took your lantern and examined the position of the arm? Didn't you?

A. Yes, sir.

Q. Why?

642 A. To make sure.

Q. Weren't you sure?

A. I was sure by the light.

Q. You were sure that the light showed purple?

A. Yes, sir.

Q. And that that meant stop?

A. Yes, sir.

Q. And yet as you got to it, to make sure, you looked down and examined the arm?

A. Yes, sir.

Q. Do you still say you were sure?

A. I was sure of what?

Q. That it was purple?

A. Yes, sir.

Q. The arm told you the same story then, didn't it?

A. Yes, sir.

Q. That is was danger?

A. Yes, sir.

Q. You knew then that you were running against the proper signals of the company and out on the main track, didn't you?

A. Yes, sir.

Q. But if you had stopped then, if the thing had stopped then it would have been perfectly safe, wouldn't it?

A. Yes, sir.

Q. If it had stopped 30 feet from this it would have been perfectly safe?

A. I don't know just how far it is to the fouling point.

Q. It is 60 feet, we stipulated here. If it had stopped any

643 time within 60 feet it would have been perfectly safe?

A. Any time before the fouling point.

Q. But you stayed right there until you got to the fouling point, didn't you?

A. Yes, sir.

Q. And when you got to the fouling point you abandoned the ship?

A. Yes, sir.

Q. And yet you knew that light was purple all the time?

A. Yes, sir.

Q. Now, Mr. Mullen, in standing there and giving Mr. Kinney the signal, you stood with your back up against the front of the caboose, didn't you? Assuming that this rail is the caboose (indicating) you stood with your back up against the front of the caboose?

A. The right-hand corner.

Q. Did you stand with your back up against the front end of the caboose? Answer me that question.

A. I stood with my back up against the righthand corner of the caboose, yes, sir.

Q. Please answer my question.

Mr. Spratt: I object to it. I say he has answered it.

A. You asked me if I stood with my back up against the front of the caboose. I say I stood with my back up against the right-hand corner of the caboose. I think that answers your question, Mr. Ward.

Mr. Ward: I would like to have the witness answer my question.

644 The Court: He is entitled to an answer to his question, and I will instruct you as one of the familiar rules of cross examination that a witness must answer questions just as they are put to him, and not some other way. If you can't answer it just as it is put say you can't, or don't know, or don't remember. That is the rule of cross examination, and that is the rule to follow. Now, read the question. Listen to it and answer it, if you can.

(Question read.)

A. I can't answer the question in that way.

The Court: All right, say you can't.

A. I can't answer it.

By Mr. Ward:

Q. You say you can't answer it?

The Court: He says he can't.

Mr. Spratt: I think the question was by yes or no.

The Court: His answer was that "I can't answer it."

Mr. Spratt: Yes or no.

The Court: He didn't say yes or no. You said that. He didn't.

Mr. Spratt: I think the counsel's question was to answer it yes or no.

The Court: He says he can't answer it. That is on the record, I take it, now.

Q. You know what the front end of the caboose is, don't you?

A. Yes, sir.

645 Q. You know what your back is?

A. Yes, sir.

Q. Can you tell me whether your back was up against the front end of the caboose?

A. My back was up against the front end of the caboose, yes, sir.

Q. Where were your feet?

A. On the end sill.

Q. Where was your body?

A. It was over that space—I was over that space between the end sill and the forward end of the caboose.

Q. That is, there is a space where the steps come down?
A. Yes, sir.
Q. And the end sill doesn't go out beyond the body of the caboose?
A. It comes out flush.
Q. Even?
A. Yes, sir.
Q. So that you stood with your feet on that end sill, your back against the caboose, and your body over in that space with the steps going down under you?
A. Yes, sir.
Q. Was your body in line with the edge of the caboose, or did it project beyond the edge of the caboose?
A. My shoulders projected out beyond the line of the caboose.
Q. Answer the question I ask you. Was your body in line with the edge of the caboose or did it project out beyond the edge of the caboose?

646 Mr. Spratt: I object to that.

The Court: I have already laid down the rule of law on cross examination, and it stands as a rule of law.

Q. You can't answer that, can you?

The Court: If you can't answer it say you can't or don't know or can't remember.

Q. Was your body in line with the edge of the caboose or did it project beyond the edge of the caboose?
A. It projected out beyond the edge of the caboose.
Q. When did you make up your mind to that?
A. I believe I have always stated that my shoulder was outside of the line of the caboose.
Q. Let me call your attention to your evidence the first time you were sworn in court, page 515, the original minutes. Were you asked: "Your body was over this space that the steps come down?" And did you answer: "My body was in line with the edge of the caboose"? Is that the way you swore?
A. Yes, sir.
Q. Do you syear any different now?
A. No, sir.
Q. Then you want to correct the answer you gave a moment ago?
A. I don't want to correct nothing.
Q. Didn't you tell me a moment ago that your shoulders were not outside the line of the caboose?
A. I testified my shoulders were outside the line of the caboose.
Q. You wouldn't change your testimony for the New York Central, would you?

647 A. No.

Q. Did you at any time, even after you found you were passing that dwarf and running into danger, did you at any time get down off from that position?

A. The only time I changed was to look down at the dwarf, at the arm of the dwarf.

Q. Then you went right back to that position?

A. Yes, sir.

Q. You were swinging your signal across the track, weren't you?

A. No, sir.

Q. Isn't that what the rules tell you to —?

A. It all depends on circumstances, Mr. Ward, where you are.

Q. I ask you what the rules told you to do.

A. Well, we can't live up according to the rules——

Q. Do the rules say that the stop signals shall be swung across the track?

A. That rule there says——

Q. Is that the way you were swinging your stop signal?

A. No, sir.

Q. Did you at any time during the balance of that movement get down on the steps?

A. No, sir.

Q. Or change your position in any way?

A. No, sir, only to look at the dwarf.

Q. And whatever signals you gave were all given from the position that you have described, weren't they?

A. Yes, sir.

648 Q. After you passed the dwarf Mr. Kinney was still 66 feet from the dwarf? You knew that something wrong was going on didn't you?

A. Yes, sir.

Q. Did you touch your red lantern then?

A. No, sir.

Q. Had the speed checked up?

A. Not any, no, sir.

Q. You were the man giving the orders and directing whether to stop or not, weren't you?

A. Yes, sir.

Q. And you knew you were the boss of the ship?

Mr. Spratt: I object to that.

Q. You were the man giving the orders and directing to stop or not, weren't you?

A. I was the man that was trying to stop him, yes, sir.

Q. And you knew he wasn't stopping?

A. Yes, sir.

Q. So that you stayed right there with your back up against the front of the caboose and your feet on the sill and continued to give signals from that position?

A. Yes, sir.

Q. The engine wasn't going so fast but what you could have stepped down off it, was it?

A. I could have got off, yes, sir.

Q. If you had got off when you saw you were passing the dwarf you could have got back to Mr. Kinney before he passed the dwarf, couldn't you?

A. No, sir, I don't believe I could.

649 Q. If you had stood right still Mr. Kinney would have come up to you?

A. The engine would have tipped over on me if I did.

Q. Was that the reason you stayed on the caboose?

A. No, sir.

Q. Why didn't you get off the caboose when you saw Mr. Kinney was getting by the dwarf?

A. I fully expected Mr. Kinney to stop every minute.

Q. You knew he had no business to run by the dwarf?

A. I knew it, yes, sir.

Q. You knew he had no business to run your caboose by the dwarf?

A. Yes, sir.

Q. You knew you had been giving him a stop signal didn't you?

A. Yes, sir.

Q. And he hadn't heeded it?

A. Yes, sir.

Q. He was, as far as you observed it, a competent and sober man up to this time, wasn't he?

A. As far as I know, yes, sir.

Q. This was the first time you had ever run with him?

A. Yes, sir.

Q. You had run with Mr. Boyle and Mr. Mattern many times?

A. Several times. Yes, I had worked with them quite a bit.

Q. A crew, the flagman, brakeman and conductor, go to-

650 gether more or less, and they are likely to have different engineers? Is that the idea?

A. Yes, sir.

Q. Supposing you had picked up that red light and stuck it out by the side of the caboose, no matter whether you moved it proceed or stop or anything else, what kind of a signal would that have been? Supposing you had just showed that red light?

A. It would have been a stop signal.

Q. This rule that you were working under was 102, wasn't it, Mr. Mullen?

A. Yes, sir.

Q. When that rule says that the flagman must take a conspicuous position what does that mean? What does the word "conspicuous" mean?

A. A position on the forward end of the leading car.

Q. Conspicuous to whom?

A. To the engineer, to those that are to receive the signals.

Q. You understood that at the time, didn't you?

A. Fully.

Q. And yet you took the position that you have described here?

A. Yes, sir.

Mr. Spratt: I object to it.

Q. And never changed it, did you?

A. No, sir.

Q. You weren't hurt, were you?
A. No, sir.
Q. Did you jump down on those semaphore wires?
651 A. When I jumped I struck them, yes, sir.
Q. On the wires, where they run along the side of the track there unprotected?
A. I didn't jump on them, but in jumping I fell on them.
Q. You fell into them?
A. Yes, sir.
Q. Did the engine roll over onto the opposite track, Mr. Mullen?
A. I believe it did, yes, sir.
Q. Did you stay on until the two engines came together?
A. Why, I must have been on there because the caboose shot right out from under me like that (indicating).
Q. The caboose went ahead faster, did it?
A. Yes, sir.
Q. And wasn't knocked off the track, was it?
A. No, sir.
Q. And the caboose went right along in the same direction that you would have gone if everything had been all right?
A. Yes, sir.
Q. That is, if you had had a green light instead of a purple light you would have gone just where the caboose went, or a part of the way?
A. Why, yes.
Q. And the caboose didn't run off the track or anything, did it?
A. I don't know whether it did or not. I couldn't state for a certainty.
Q. Did you see it as it went on up the track?
A. I believe I did, yes, sir.
652 Q. It was running on the rails, as far as you could tell, wasn't it?
A. Yes, sir.
Q. And it had passed by the switches?
A. Yes, sir.
Q. And after awhile it came back?
A. Yes, Goulding brought it back.
Q. Pushed by the Niagara Falls train?
A. Yes, 446.
Q. Then it piled up on this Michigan Central engine, didn't it?
A. Yes, I believe it did.
Q. And caught afire?
A. Yes, sir.
Q. How close was it to where Kinney lay there?
A. Oh, a mere matter of the length of the engine, I guess.
Q. It burned up there while Kinney was laying there?
Q. Yes, I believe it did.
Q. Who put it out?
A. The fire department.
Q. The city fire department?
A. Yes, sir.

Q. That was all done before the wrecking crew got there and lifted the engine off of Kinney?

A. I am not quite certain about that, Mr. Ward, whether the wrecking crew had arrived before the fire department or not. I wouldn't state for a certainty.

Q. But it was not until after the fire was extinguished that they got Kinney out?

653 A. No, sir.

Q. Were you making that statement up in the tower to Mr. McEwen while the fire was going on?

A. No, sir, I believe the fire was out when I made the statement to Mr. McEwen in the tower.

Q. It was about 30 minutes, wasn't it?

A. I don't know. I couldn't tell the exact time.

Mr. Ward:

Q. I didn't ask you the exact time. I say it was about 30 minutes?

A. As I understand it, it was an hour before the wrecking train got there.

Q. Was it about 30 minutes that you made this statement?

A. I couldn't say for a certainty.

Q. Did you testify before that it was somewhere around 30 minutes?

A. I don't remember whether I did or not.

Q. If you did was it true?

A. Why, if I stated that it must be.

Q. Let me call your attention to your testimony, folio 2476. "Q. Was that the one (referring to the statement made to Superintendent McEwen) that was within 30 minutes of the time of the accident?" And did you answer: "I don't know, it was somewhere around there?" "A. Yes."

A. Yes.

Q. Is that what you say now?

A. Yes, sir.

Q. Who else made statements to Superintendent McEwen up there that night?

A. I don't know.

Mr. Ward: That is all.

654 Redirect examination.

By Mr. Spratt:

Q. I suppose events happened there pretty rapidly that night?

A. They certainly did. They were coming thick and fast.

Q. Just whether it was 30 minutes or twice that, can you tell?

A. I couldn't tell, no, sir. I was a little excited, more or less excited at the time.

Q. Your recollection is that it was after the wrecking crew got there before you made your statement?

A. Yes, sir.
Q. And didn't you so state on the last trial?
A. That it was after the wrecking crew? I don't remember whether I did or not.

Mr. Ward: I don't think the counsel is at liberty to support the witness by finding similar statements. It is only where I contradict the witness that I point out previous testimony.
Mr. Spratt: It is right in connection with that previous testimony that you asked him. I asked him whether he didn't state in that connection that it might have been an hour.

A. I said it might have been an hour or it might have been 30 minutes. I couldn't say.

Mr. Ward: He said it might have been an hour, and then his attention was called to it and he said it might have been half an hour.
Mr. Spratt: I don't think anybody would know under those conditions.

655 Q. Counsel asked you if you weren't the eyes of the engineer in observing signals. I ask you whether or not under the rules it is the duty of the engineer himself to observe signals as well as you?
A. Yes, it is.
Q. It was his duty to observe this signal also as he approached wasn't it?
A. Under the circumstances, yes.
Q. Just what position did you take at the end of this car?

Mr. Ward: I object to that. That has been gone over on direct and cross examination.
Mr. Spratt: Counsel refused to let him answer.
Mr. Ward: The counsel is asking Mr. Mullen a general question. Keeps going into this whole thing again.
The Court: Let him go on. We have spent a lot of time. We can spend a week or two more.

Q. What position were you standing in?
A. Well, I will illustrate it here to you. Here (indicating) is the line of the caboose, and that thing there (indicating) is the brake wheel. I had my hand on the brake wheel. That is the position that I assumed on the forward end of the caboose. That is what I call a commanding position.
Q. Counsel asked you where your back was. Where was your back?
A. Up against the caboose about here (indicating).
Q. Where was your shoulder?
656 A. My shoulder was outside the line of the caboose.
Q. Did all the signals you gave, both the come-ahead and to stop, were they given outside the line of the caboose?
A. Yes, sir.
Q. So that did the engineer have the full view of a complete signal in both instances?

A. Yes, you were supposed to give—it all depends on circumstances, where you are. Sometimes you might be in between cars and that will require a short circle. There is a lot of times when we work between two strings of cars when we have got to take a lamp like that over our heads (indicating) and give him a stop signal that way (indicating).

Q. But the stop signal is a horizontal signal?

A. Yes, sir.

Q. And the come-ahead signal is vertical?

A. Yes, it all depends on where you are.

Q. When the counsel asks you whether or not you swung it across the track, are there instances where you can't swing it across the track you are running on and show it to the engineer?

A. Yes, many.

Q. Was this an instance where you couldn't swing it directly across the track you were running on and display it to the engineer?

A. Yes, sir.

Q. Then if you swung it right across the track then it would be in the line of the caboose, would it?

A. No, sir.

Q. I say, if you swung it right across the track that you
657 were running on then some part of the signal would be obstructed——

A. Would be directly in front of the track, in front of the caboose.

Q. So that the engineer couldn't have seen the whole signal?

A. Yes.

Q. The counsel has asked you about the red light. Under those conditions you stated on your direct examination you had to keep the red light concealed as you were going down there?

A. Yes.

Q. When you observed he wasn't going to stop you were then pretty close to the main line tracks, weren't you?

Mr. Ward: I object to that as suggestive and leading. Counsel has been violating the rule——

The Court: That is leading.

Mr. Ward: And I haven't objected, but it gets of importance sometimes.

Mr. Spratt: It is simply going over something that the counsel has asked him. I will take the time if you want it, and ask him——

The Court: I want it to be done according to the rules. We have got lots of time. Don't let me hurry you.

Q. About how far were you from the fouling point when you observed Mr. Kinney was passing the dwarf signal?

A. I don't know just how far it is.

Q. Give us your best estimate?

658 A. 50 or 60 feet.

Q. Now, to get the red light you would have to leave the position where you were, would you?

A. Yes, sir.

Q. And would have to open the door of the caboose?

A. Yes, sir.
Q. And get the red light?
A. Yes, sir.
Q. And bring it out?
A. Yes, sir.
Q. And go back where you were?
A. Yes, sir.
Q. And swing it?
A. Yes, sir.
Q. Now, in that time, in that short distance you had to go before you reached the fouling point, did you consider that you could possibly do that?

Mr. Ward: I object to that as incompetent and immaterial, what the witness considered.
The Court: Yes.

Q. Did you believe it was possible to do that?

Mr. Ward: Same objection.
The Court: Objection sustained.
Mr. Spratt: Exception.

Q. The counsel has asked you why you didn't go after the red light. Will you say why you didn't go after it?
A. Well, if I had went after the red light, by the time I got the red light and got out to where I could use it, we would have been away out on the main track at the speed we were going.
659 Q. When you stood there and found he was going by what did you say you did with reference to swinging your stop signal?
A. I increased the speed of my stop signal—more rapidly.
Q. Now, the counsel asked you if you knew that the rules required you to place yourself in a conspicuous position. State whether the position you took at the corner of this car was a conspicuous position?
A. It was, yes, sir.
Q. Was it so conspicuous that Mr. Kinney could have seen the signals you gave if he was looking?

Mr. Ward: I object to that as calling for a conclusion, and relates to the province of the jury.

A. Yes.

Mr. Ward: And I ask that the answer be stricken out, which was interposed while I was making my objection.
The Court: He has stated where he was, and it has been stated where Mr. Kinney was. It is for the jury to determine all the rest of it, the conspicuous character of his position.
Mr. Spratt: The counsel read him a rule and asked whether that was a conspicuous position.
Mr. Ward: May the answer be stricken out?
The Court: Yes, strike it out.
Mr. Spratt: Exception.

660 Q. Did you state on the other trials of this case that your shoulder was outside the line of the caboose?

Mr. Ward: I object to that as incompetent and immaterial. He can't sustain a witness by asking him——

The Court: It is not asked him for the purpose of contradicting him.

Mr. Spratt: Counsel asked him a question about his body and that sort of thing.

Mr. Ward: The fact that I cross examine the witness does not give you the right.

Mr. Spratt: I am just straightening that out.

The Court: You are calling on him to tell something he said at another trial to support what he said now?

Mr. Spratt: No, the counsel asked him what he testified on other trials.

The Court: To contradict him?

Mr. Spratt: About where his body was.

The Court: That he had a right to do on cross examination.

Mr. Spratt: I asked him if on the other trials he testified that his shoulder was outside the line of the caboose.

The Court: I don't think you can do that, Mr. Spratt.

Mr. Spratt: The court will give me an exception?

The Court. Yes.

Mr. Spratt: That is all.

Mr. Ward: That is all.

661 ROBERT J. BOYLE, was duly sworn as a witness on behalf of the defendant:

Direct examination.

By Mr. Spratt:

Q. Mr. Boyle, where do you live?

A. I live at East Bethany, Genesee County, New York.

Q. During the year 1908 were you a brakeman in the employ of the New York Central?

A. Yes, sir.

Q. How long had you been brakeman at that time?

A. About 5 years.

Q. Do you remember the accident to Mr. Kinney?

A. Yes, sir.

Q. It has been stated here that some time after the accident you were promoted?

A. Yes, sir.

Q. Were you promoted since the accident?

A. Yes, sir.

Q. How long after the accident were you promoted?

A. Three years.

Q. Were you promoted in the regular way?

A. Yes, sir.

Q. By what rule?
A. By the order of seniority.
Q. Do you remember of Mr. Kinney coming down there that day with his engine?
A. Yes, sir.
Q. And coupled onto your caboose and a couple of snow plows, or snow plow and flanger?
662 A. Yes, sir.
Q. Had you ever seen Mr. Kinney before that day?
A. Yes, sir.
Q. You knew him?
A. Yes, sir.
Q. You took the snow plow and flanger to Tonawanda?
A. North Tonawanda.
Q. And then came back and coupled onto a train at East Buffalo?
A. Yes, sir.
Q. A miscellaneous train, was it?
A. Yes, sir.
Q. And about how many cars were in that train?
A. I don't just remember how many cars there was.
Q. Did you leave part of that train at Elmwood avenue siding?
A. Yes, sir.
Q. And then where did you leave the balance?
A. On the southern track.
Q. And after you left the train at the southern track what was done with the engine?
A. I left the engine on the southern track and went to the yard office——
Q. With the conductor?
A. With the conductor, yes, sir.
Q. And when you were at the yard office did you get orders about what should be done with the engine?
A. Yes, sir.
663 Q. And what were the orders?
A. The orders was to go back to Tower "H" and get ahold of the caboose, run around the "Y," and bring it back and put it in on the fence track, on a train on the fence track.
Q. Did you go back to the engine?
A. The engine had crossed out on the main track at the water plug, and I went to the engine there.
Q. Did the conductor go back with you?
A. No, sir.
Q. When you got back to the water plug they were taking water, were they?
A. Yes, sir.
Q. Did you communicate the orders to anybody, and if so to whom?
A. Yes, sir, to Mr. Kinney.
Q. You communicated it to him while he was at the water plug?
A. Yes, sir.
Q. Then where did the engine go?

A. The engine proceeded down the westbound track to Tower "H" and crossed in there and nosed onto the caboose, that is, the pilot, the rear of the caboose.

Q. Then where did you go?

A. We took the caboose and proceeded around the "Y," to the right around this leg of the "Y" here (indicating).

Q. That is the belt line; so called?

A. The belt line, and over to Tower "I."

Q. And did you stop there?

A. Yes, sir, we stopped in front of the tower there, and I
664 went with Mullen and threw some cross-over switches, that is up here east of the Military road.

Q. And what track of the "Y" would that have taken you up to if you had used that track?

A. That would have taken me with the turn of traffic on this right leg of the "Y" here (indicating) to 55.

Q. As you were doing that did you receive some directions from Mr. Kinney?

A. No, I threw this further switch, and Mullen threw the nearest switch, and I give him a signal to back up, and they didn't back up. It is a cross-over. So the next I heard was from Mr. Mullen. He called to me to close up the switch and come on, that we were going against the current of traffic. So I closed the switch and got on the engine.

Q. Whereabouts on the engine did you get?

A. I got in the gangway of the engine, between the engine and the tender.

Q. What occurred after you got on?

A. We were proceeding at the time along against the current of traffic.

Q. Did you see where Mr. Mullen went?

A. Mr. Mullen, he went on the front end of the caboose.

Q. And were there any signals given before your engines started?

A. I don't remember. I think there was.

Q. Your engine did start, did it?

A. It was just started out as I got on.

Q. Will you tell what signals you noticed given by Mullen
665 or from the one on the front end of the caboose as you passed along there towards the main track?

A. When we passed along toward the main track the first signal Mullen gave that I noticed was just this side of Hertel avenue here (indicating).

Q. What signal was that?

A. That was a slow, come-ahead easy signal.

Q. Then go on and tell what other signals you saw him give, and where they were given.

A. Well, we crossed over Hertel avenue about a car length when I observed the dwarf signal, and——

Q. You observed the dwarf signal?

A. Yes, sir.

Q. What was the dwarf signal?

A. It was purple.

Q. State whether that was the place where you were able to first observe it?

A. Yes, sir.

Q. What prevented you from observing it earlier?

A. That track is on a curve there, and being in that condition you are unable to see that light before you get to where you can see it.

Q. Which side of the engine were you on?

A. On Mr. Kinney's side, on the right-hand side of the engine.

Q. On the right-hand side as you proceeded toward the main tracks?

A. Yes, sir.

Q. Now, did you observe that light from the time you first
666 saw it until the time of the collision?

A. I think so, yes, sir.

Q. And what color was it?

A. Purple.

Q. At all times?

A. Yes, sir.

Q. Now, as you proceeded along there did you notice Mullen give any other signals after the come-ahead signal that you have described?

A. I noticed Mullen give—swing him up when he got about, I should judge, a couple of car lengths from the dwarf.

Q. And what was the signal he gave?

A. He gave a stop signal.

Q. Was the come-ahead signal clearly in your view, the come-ahead signals?

A. Yes, sir.

Q. Was the stop signal clearly in view?

A. Yes, sir.

Q. Were all the signals he gave complete——

A. Yes, sir.

Q. In your view?

A. Yes, sir.

Q. Now, after he gave the stop signal did Mr. Kinney stop the engine?

A. No, sir.

Q. What further signals did you notice Mullen give as you went along there, after he started to give the stop signals?

A. He didn't give any different signal, only increased the rapidity of the signal.

Q. Increased the rapidity of the stop signal?

A. Yes, sir.

667 Q. Did Mr. Kinney keep going?

A. Yes, sir.

Q. As you got up to the dwarf what observation did you make as to that right there?

A. I was passing the dwarf, I stepped down on the steps provided there for getting on the engine, and observed the dwarf signal.

Q. How was that on?
A. That was in a horizontal position.
Q. And what did that mean?
A. Stop.
Q. Did Mr. Kinney keep moving the engine on until the accident happened?
A. Yes, sir.
Q. Where did you land?
A. I landed—I stayed on the engine.
Q. When the engine tipped how did you get off?
A. I stayed right on it and tipped over with the engine, of course.
Q. You weren't caught though?
A. No.
Q. Did you have a clear view of the dwarf before you passed it?
A. Yes, sir.
Q. And what color was it?
A. Purple.
Q. I suppose engines will leak steam, won't they, even when they are in first class shape?
A. Why, more or less.
Q. Now, all that time that you were with that engine, and the time that you observed it from the afternoon when you went
668 with Mr. Kinney, until the accident occurred, did you observe whether that engine was leaking any unusual amount of steam?
A. No.
Q. As you went along this "Y" against the current of traffic and down to the time of the accident, was there any steam that obstructed your view of the dwarf?
A. No.
Q. Did you call Mr. Kinney's attention or did you make any effort to attract Mr. Kinney's attention when you saw that he was going by the dwarf?
A. Yes, sir.
Q. What did you do?
A. I told Mr. Kinney the dwarf was against him, that he was swinging him up. I says "You are going by."
Q. Did he pay any attention to it?
A. No.
Q. The fireman's name was Sauer, was it?
A. Yes, sir.
Q. From your position in the cab, standing in the gangway there, could you see Mr. Sauer?
A. Yes.
Q. Did he at any time come over and look at the dwarf and say to Mr. Kinney that it was green, or words to that effect?
A. No, sir.
Q. Did he or Mr. Kinney have any conversation as they passed along there, about signals?
A. Not that I know.
Q. Calling signals?

A. Not that I know of.

669 Q. Were you in a position to have heard it if there had been any such talk?

A. It would seem so.

Mr. Spratt: You may examine.

Cross-examination.

By Mr. Ward:

Q. So that you rode right on this engine that was going down there to destruction and stayed until it tipped over, did you?
A. Yes, sir.
Q. And you stood within 18 inches of Kinney?
A. Yes, sir.
Q. Saw that he was going by a signal?
A. Yes, sir.
Q. Spoke to him?
A. Yes, sir.
Q. Spoke to him as loud, I suppose, as you have to the jury here?
A. Yes, sir.
Q. He paid no attention to you?
A. No.
Q. Didn't seem to hear you, did he?
A. No.
Q. Went right on? You never touched him?
A. No.
Q. Never laid your hand on him?
A. No.
Q. Never touched the throttle?
A. No.
Q. You knew what the throttle was for, didn't you?
A. Yes, sir.
Q. You could have stopped the engine, couldn't you?

670 Mr. Spratt: I object to it.

A. I suppose so.
Q. You know what the air brake is for?
A. Yes, sir.
Q. You could have used that?
A. Yes, sir.

Mr. Spratt: I object to that.

The Court: Let him examine the witness. The rules are familiar. He has a wide latitude to test his memory, his credibility. That is a proper question.

Mr. Spratt: He is asking something that the man had nothing whatever to do with. He might have asked me if I came down to stop the engine in the basement.

The Court: The objection is overruled and give you an exception.

Q. When he got to the dwarf you knew he was going by it, didn't you? You saw he was going by it when he got to the dwarf, didn't you?

A. Yes, sir.

Q. You knew that meant he was going out on the line of the main track where passenger trains were liable to run into him, didn't you?

A. Yes, sir.

Q. From your experience in railroading you knew that what did happen was liable to happen, didn't you?

A. Yes, sir.

Q. And so you stood there?

A. I stood there.

Q. And did nothing?

A. No.

671 Q. Did nothing, did you?

A. I only called his attention that he was going by.

Q. And you saw that he didn't hear you?

A. He didn't appear to. He didn't stop anyway.

Q. And the thing went on, the thing went right on, didn't it?

A. Yes, sir.

Q. And you told this story up in the tower that night, didn't you, the same story you are telling here you told up in the tower that night?

A. I think so.

Q. And you got acquitted, didn't you?

Mr. Spratt: I object to it.

Q. You weren't punished for any connection with this matter?

A. No.

Q. You were cleared, weren't you?

A. As far as I know.

Q. Now, Mr. Boyle, let us go back a little bit. You told Mr. Kinney to turn his engine around, didn't you?

A. Yes, sir, I gave him the orders I got from the yardmaster.

Q. And that is what he was doing when this thing happened to him?

A. Yes, sir.

Q. Obeying the orders you gave him?

A. Yes.

Q. After the engine was turned around what would have been your first business?

Mr. Spratt: I object to it. He has answered that he was obeying the orders.

672 A. I would obey the orders of the conductor, whatever he told me to do.

Q. You and the conductor would have gone over to this train that you were going to——

A. I suppose we would.

Q. This train lay along this siding up from Austin street toward Tower "I"?

A. Yes, sir.

Q. You and the conductor had to go over there before you pulled it out?

A. Yes, sir.

Q. Mullen's business, I suppose, was to stay where?

A. With the engine.

Q. And he was performing the ordinary duties when he got up there on the front of that caboose to give signals?

A. Yes, sir.

Q. There was nothing for you to do in the engine, was there?

A. No.

Q. You weren't riding there for the purpose of warning Kinney, were you?

A. That was my place——

Q. You weren't riding there for the purpose of warning Kinney, were you?

A. That was a part of my duty.

Q. Did you get up there with that idea in your mind when you started from Tower "I" that may be Kinney wouldn't know his business and you would get up there and tell him?

A. That is what I should have done.

673 Q. That is what was in your mind when you got up there?

A. I don't know as it was in my mind when I got up there.

Q. What did you get up there for?

A. That was the place I—part of my duty.

Q. You didn't have anything to do with running the engine, did you?

A. I didn't have nothing to do with running the engine, no.

Q. The trainmen ride in the caboose, don't they?

A. Why, not always.

Q. What called you to ride in that little narrow gangway there between the caboose and the engine?

A. Why, that is the place I got on the train. Mr. Kinney had started up, and that was the first available place to get.

Q. And you so stood there all the time?

A. Yes, sir.

Q. You had a lantern in your hand, didn't you?

A. Yes, sir.

Q. And of course you were operating under the rules of the company, weren't you, Mr. Boyle?

A. Yes, sir.

Q. And you understood the rule of the Company, 107, which provides in a general way that you should do what is necessary to protect company property in times of emergency?

A. Yes, sir.

Q. That is your duty?

A. Yes, sir.

674 Q. When you see any danger impending, so far as you can, it is your duty to avert it?

A. Yes, sir.

Q. Did you lay your hand on Mr. Kinney when you saw he was doing all these wicked, wrong things?

A. No.

Mr. Spratt: I object to that.

Q. How close were you to him?

Mr. Spratt: I object to it.

Q. About as close as you are to this (indicating)?

Mr. Spratt: I think I ought to have an objection to this.

The Court: I will rule that out, that phraseology. That he was laying his hand on Kinney, he may ask that.

Q. You could have laid your hands on Mr. Kinney?

A. Yes, sir.

Q. Just as easy as you could touch me, or that young gentleman there, (indicating)?

A. Yes, sir.

Q. Just about as close as you are to me?

A. Yes, sir.

Q. How far did the engine and the caboose travel after it had passed the dwarf and before the collision came?

A. How far did the engine and caboose travel?

Q. Yes, after you passed the dwarf and until the collision came?

A. Why, I don't know just exactly.

Q. Twice the length of this room, didn't it?

675 A. Nearly that.

Q. And during that time you stood right there beside Kinney?

A. Only when I got down to observe the dwarf when I went by it.

Q. And then you got right back?

A. Yes, sir.

Q. Did you say anything more?

A. No, I didn't.

Q. Did you touch him then?

A. No.

Q. Or the appliances?

A. No.

Q. You knew he was subjecting company property to risk, didn't you?

A. Yes.

Q. You knew he was subjecting the lives of not only you and himself, and the other men on that train, but possibly the passengers on the passenger trains? You knew that?

A. Yes.

Q. Have you got any reason to tell this jury why you didn't do something to stop this, to avert this catastrophe, that you knew was going to happen?

A. Why, no.
Q. Mr. Kinney didn't act as if he knew what was going to happen, did he?
A. I don't know as to that.
Q. He didn't appear to heed you or hear you, did he?
A. No.
676 Q. He wasn't doing the things that an engineer would do to stop his engine when he was getting a stop signal?
A. No.
Q. But you knew that everything was wrong, didn't you?
A. Yes.

Mr. Spratt: I object to that.

Q. You knew that Mullen was giving a stop signal?

Mr. Spratt: Just wait a minute. I object to that as too indefinite.
The Court: Objection overruled.
Mr. Spratt: Exception.

Q. You knew Mullen was giving a stop signal?
A. Yes.
Q. You knew the light was against you?
A. Yes.
Q. You knew the engine was going on out on the track?
A. Yes, sir.
Q. So that you stood there and watched the performance?

Mr. Spratt: I object to it.

Q. Did you do anything else?
A. Called Mr. Kinney's attention to the signal.
Q. Mr. Boyle, haven't you just told me that after you left the dwarf you didn't do anything else?
A. What?
Q. And when the engine tipped over you were still in the gangway, a little narrow place not much wider than this space
677 here (indicating)? How wide was it, as wide as the place you are standing in now?
A. I think it is about a couple of feet wide.
Q. And you stood up there, or laid down, which?
A. I stood there.
Q. And the fireman, he got over you, didn't he?
A. Well, he got by me anyway.
Q. Did he jump over you?
A. Whether he jumped—I think he was more thrown than jumped.
Q. You told one of the juries once, didn't you, that the fireman jumped over you?
A. Well, when he jumped the engine was tipping over.
Q. You were lying down then, were you, when he jumped?
A. No, not exactly, Mr. Ward.
Q. But you did tell one jury that he jumped over you, didn't you?

A. I don't know whether he jumped—he was thrown more than jumped.
Q. He went over you?
A. Yes, sir, kind of over me.
Q. And then Mr. Kinney, he got over you?
A. Around me.
Q. And Mr. Kinney got caught under the engine?
A. Yes, sir.
Q. But you didn't get hurt?
A. Not to speak of.
Q. But you were there?
A. Yes, sir.
678 Q. Stuck to the engine?
A. Yes, sir.
Q. Who helped Kinney? Did you touch him?
A. Yes, sir.
Q. Who saw you?
A. Sauer.
Q. Sauer saw you?
A. Yes, sir.
Q. Sauer works for the company yet, doesn't he?
A. I suppose he does.
Q. Where is he?
A. I am sure, Mr. Ward, I don't know.
Q. He has been here during the first part of the trial, when I had him under subpœna, hasn't he? Have you seen him in the last two or three days?
A. No, sir.
Q. Sauer knows you were there, doesn't he?
A. Yes, sir.
Q. Did you see that old gentleman come down from the Kam malt house with his lantern, to help Mr. Kinney?
A. I don't remember, Mr. Ward.
Q. Did Mr. Mullen see you there?
A. I suppose he did.
Q. Do you know of a single living soul, Mr. Boyle, that saw you on that engine but your say-so?
A. Mr. Kinney and Mr. Sauer are the only people that I know of.
Q. You heard what Mr. Kinney said here, didn't you? You heard what Mr. Kinney said about it, didn't you?
679 A. I believe I did.
Q. You say that Mr. Sauer didn't call that signal to Kinney?
A. No.
Q. Wasn't it his duty to?
A. Why, yes.
Q. Wasn't it his duty to call the condition of the lights at Hertel avenue to Mr. Kinney—or I mean the condition of the street to him?
A. Yes.
Q. He didn't do that?

A. I don't think so.
Q. And he didn't call the condition of this purple light to him?
A. No.
Q. That was his duty, wasn't it?
A. Yes.

Mr. Ward: All right.

(Adjournment until Tuesday, February 4, 1919, at 10 o'clock a. m.)

Proceedings of Tuesday, February 4, 1919—10 a. m.

ROBERT J. BOYLE resumed the stand for redirect examination by Mr. Spratt:

Q. Mr. Boyle, did you know up to the time that you reached the dwarf that Mr. Kinney wasn't going to stop?
680 A. No, sir, I expected he would stop every minute.
Q. You say you reached down with your lantern to see what the arm was?
A. Yes, sir.
Q. And then you swung yourself back on the engine, did you?
A. Yes, sir.
Q. Was it a long or short time before the accident happened?
A. It was a short time.
Q. Did you call his attention again to it after you reached down and saw what——
A. No, sir.
Q. Was it a short time?

Mr. Ward: I object to that.

Q. Why didn't you?
A. I considered I had did all I could, and that the space was too short a time, if he didn't stop that the——
Q. Are you an engineer?
A. No, sir.
Q. Have you ever been one?
A. No, sir.
Q. Mr. Ward asked you why you didn't run in there and grab the throttle or stop the engine. Did you know anything about that kind of work?
A. No, sir, I consider that a dangerous piece of work to try to jump into those levers and stop that engine before the accident occurred, before we would be on the main track. It might retard it enough so it would do more damage than it did.
Q. You didn't know whether you could do it right or not?
681 A. No, sir.
Q. You say you saw Mr. Mullen's signals? Will you tell the jury, show the jury just what these signals were that you saw?
A. (Witness takes lantern in his hand.) I saw Mullen's sig-

nals as they started out to come-ahead, before we crossed Hertel avenue, the easy come-ahead signal in that way (indicating).

Q. Was that the kind of signal you saw?

A. Yes, sir.

Q. Were those the come-ahead signals that he gave all the times that you saw?

A. Yes, sir.

Q. State whether or not that signal was complete in your sight, completely given in your sight?

A. Yes, sir, that was completely in my sight, a complete signal.

Q. The witness holds out the lamp about—just hold it out.

(Witness holds out lantern.)

Q. Just a little below his arms, below the shoulder, and gives a vertical signal, say about 18 inches swing?

A. Yes (illustrating).

Q. How did that light show——

Mr. Ward: That is a circular signal. That is not a vertical signal, and you know it.

Q. How did the light show in that signal?

A. The light showed up and down.

Q. You say he gave a stop signal?

A. Yes, sir.

Q. Will you show the jury the stop signal?

(Witness illustrates.)

682 Mr. Spratt: The lamp swings from the highest point about the shoulder and then across his body.

Q. Could you see that that was a stop signal?

A. Yes, sir.

Q. Did the light disappear some of the time at the end at the down swing?

A. Why, the light disappeared for just a fraction, about a second or so, yes.

Q. And then did it come back again?

A. Back again, yes.

Q. Is that what you call——

A. That is what I call a stop signal.

Q. Was that horizontal or vertical?

A. Horizontal, yes, sir.

Q. Now, state whether it was your duty to be on the engine or on that——

A. Yes, sir, it was my duty to be on that train.

Q. And after the accident happened what did you do?

A. The first thing I did, I looked to see what was in the wreck, what trains was in the wreck, and I see the flagman going out on No. 3, and then I tried to get Mr. Kinney from under the engine.

Q. From under the engine?

A. Yes, sir, myself and Sauer. He was covered over with coal.

We scraped what coal we could off of him and tried to pull him out, but I found we couldn't. He was fast. We couldn't pull him out. Then I made my way to the tower and I asked Mr. Reithenburg if there was any jacks——

Mr. Ward: I object to any conversation.

Q. You went to the tower, did you?
683 A. Yes, sir.
Q. After you came from the tower——
A. After I came from the tower I went to the section men's tool house.
Q. Where was the section men's tool house?
A. It was situated, I think, just a little this side of Hertel avenue some place (indicating).
Q. That is southerly of Hertel avenue and on the right hand side of the tracks?
A. Yes, sir. And the door was locked there and I couldn't break in.
Q. What did you go there for?
A. I went there for to see if I could get some jacks.
Q. And then where did you go?
A. I returned to the wreck.
Q. You were working around there until what time?
A. I was about there until the wrecking outfit crew came there and until after they had cleaned it up.
Q. If the engine had been leaking steam from the left piston and from the belly of the engine back of the saddle and so much steam that it concealed and obstructed the view of the engineer to seeing signals, was there any way that he could have operated that engine if he wished to take the train from the fence track back to East Buffalo and avoid the obstruction of steam?
A. Why, Mr. Kinney could have backed to East Buffalo if he considered that—that was up to the engineer.
Q. To do?
684 A. To do.
Q. Did he have the say how he should run his engine?
A. I always was given to understand that the engineer had the right to say how he would run his engine.
Q. And was that frequently done in that run from Black Rock to East Buffalo, and vice versa?
A. Yes, sir.
Q. That engine was run backwards instead of frontwards?
A. Yes, sir.
Q. What are you doing now?
A. I am a farmer.
Q. When did you quit working for the company?
Q. Why, I didn't quit, Mr. Spratt. I got 30 days leave of absence and didn't go back. I couldn't come back.
Q. You couldn't leave the farm?
A. Yes.

Q. You have a farm of your own?
A. Yes.

Recross-examination.

By Mr. Ward:

Q. Mr. Boyle, did you devote a little time to this case with Brother Spratt this morning?
A. I was at his office, Mr. Ward.
Q. What time did you get there?
A. About 9.30.
Q. What did you talk about?
A. Well, we talked about the case a little.
Q. About the case? Did he tell you you made a pretty
685 poor witness yesterday and you would have to brace it up a little?

Mr. Spratt: I object to that. He didn't make a poor witness. He made an honest witness.
The Court: Yes. Whether he was an honest or dishonest witness is for the jury to determine, not for Mr. Ward or Mr. Spratt.
Mr. Ward: I was asking him what Mr. Spratt asked him about.
Mr. Spratt: You are asking him in a very improper way, and I assume I have a right to talk to the witness.

Q. What did Mr. Spratt say to you this morning?
A. Why, I don't know just exactly what he did say. He asked me a few questions like what he did here.
Q. Did you come over here with him to court?
A. I believe he walked with us a part of the way, Mr. Ward.
Q. Who else was with you?
A. Mr. Mullen.
Q. There isn't any doubt you had a lantern in your hand all the time up to the time that the engine tipped over?
A. There is no doubt about it.
Q. You had one in your hand?
A. Yes, sir.
Q. And it was lighted?
A. Yes, sir.
686 Q. The first that you saw of Mullen giving any stop signals was when he was within a car length of the dwarf, wasn't it?
A. A couple of car lengths, I should judge, Mr. Ward.
Q. Would you say one or two?
A. Two, I should think, at least.
Q. Is that something you have discussed with Mr. Spratt, whether it was one or two?
A. No, sir.
Q. You didn't discuss that?
A. No, sir.
Q. Did you ever say that it was two before?

A. Why, I don't remember, Mr. Ward. I think that is about what is was. I don't know.

Q. If you said that it was one before would you change your recollection now?

A. Well, I would consider that it would be better then than it is now, Mr. Ward. I don't remember just exactly about it.

Q. Let me call your attention to your testimony on the last trial, page 652: "A. That is where I noticed his stop signal, about a car length, I think."

A. About a car length.

Q. "Q. A car length before the dwarf? You were looking out? A. Yes, sir." Is that what you testified to the last time?

A. Yes, sir, that is part of the testimony there.

Q. Now, which do you say it was, one car length or two car lengths?

A. Well, that testimony there, Mr. Ward—if that is the whole thing, or a part of the thing, it is correct.

Q. Which do you say it was now? One car length or two car lengths?

687 The Court: Just answer his question.

A. Why, two car lengths.

Q. You say it was two car lengths?

A. Yes, sir.

Q. If you said it was one car length the last time you weren't telling the truth, were you?

A. I don't know, I am sure. It is the best of my judgment.

Q. Were you telling the truth if you said it was one car length before?

A. As far as my judgment was concerned, I judged at the time it was about a car length.

Q. You what?

A. At that time I judged it was about a car length.

Q. Now you judge it was about two car lengths?

A. Why, yes.

Q. Does your judgment vary from time to time?

A. In some matters like that I presume I do.

Mr. Ward: I guess that is all.

Q. You stated—I will read your testimony to you in that respect—you said, didn't you, on the last trial, "It was about a car length"?

A. About a car length.

Q. You didn't say a car length?

A. All right.

Mr. Spratt: That is all.

By Mr. Ward:

Q. I want to ask Mr. Boyle another question. Where do you claim that it was the first time that you saw this dwarf signal?

688 A. Where we were when I called his attention?

Q. Yes, when you saw it.

A. When I saw it first, about a car length the other side of Hertel avenue.

Q. That is when you first saw it?

A. Yes, sir.

Q. Did you call Kinney's attention to it then?

A. Yes, sir.

Q. At that time?

A. Yes, sir.

Q. Now, Boyle——

A. I told him the signal——

Q. Didn't you just swear here a moment ago that it was one or two car lengths from the dwarf when you first called Mr. Kinney's attention to it?

A. Yes, sir.

Q. Didn't swear to that within five minutes?

A. Within five minutes.

Q. Before that jury?

A. Before that jury.

Mr. Ward: I am through with you.

By Mr. Spratt:

Q. You told him that was one of the times?

A. That was one of the times, not the first time.

Mr. Ward: He said the first time.

The Court: The jury will remember what he did say.

Mr. Ward: I ask the stenographer to return to that.

By Mr. Ward:

Q. Didn't you just testify here that you called Mr. Kin-

689 ney's attention to the fact that the dwarf was against him within one car length of Hertel avenue?

A. Within one car length of Hertel avenue?

Q. Yes.

A. No, sir.

Q. Is that what you say now?

A. No, sir.

Q. What do you say now?

A. A car length the other side of Hertel avenue.

Q. That is when you called Kinney's attention to the fact that the dwarf was against him?

A. Yes, sir.

Q. Told him that?
A. Yes, sir.
Q. Do you remember your testimony on the first trial?
A. I think so.
Q. Do you remember on the first trial that the first time you told Kinney about it was when you were a car length from the dwarf?
A. No, sir.
Q. (Showing copy of testimony to witness.) See if I read correctly your testimony on the first trial (reading): "Now, did you testify, or did you state at the Claim Agent's office to Mr. E. F. Van Hozen, Steam Railroad Inspector, connected with the Public Service Commission this, 'Trainman R. J. Boyle who was on the train states that he called Engineer Kinney's attention to the dwarf, when the caboose' "—then I was interrupted and I continued—

690 "Did you state to Mr. Van Hozen that you called Engineer Kinney's attention to the dwarf when the caboose was about a car length from the dwarf signal, and told him a second time that the dwarf was against him, but the engine was right at the signal then?" And did you answer "That is the second." Am I reading this correctly?
A. Yes, sir.
Q. Then did I say, "Did you say what I read to you there, to Mr. Van Hozen, or to somebody at the Claim Agent's office? Don't look at Mr. Rourke now, you just look at the jury. A. Supposing I look right at you? A. That is a good idea. You look at me and then I will know whether you are telling the truth or not. A. All right. We will leave that to the jury to state. Q. Can't you answer? A. I think I told Mr. Kinney that. Q. Think you told who that? A. Mr. Kinney. Q. That is not what I asked you. Did you state that to Mr. Van Hozen or somebody at the Claim Agent's office, at the time of this investigation? A. Probably." And did I say "Q. Was it true?" And did you answer, "A. Yes, sir."? Is that there?
A. That is there, Mr. Ward.
Q. Did I read it correctly?
A. The second time, yes, sir.
Q. Did I read it correctly to you, Mr. Boyle?
A. Yes.
Q. Was it true?
A. I called his attention to it the second time.
Q. Was it true what I read you?
A. Yes.
Q. You wouldn't change your testimony from time to time in this law suit, would you?

691 A. No, Mr. Ward.
Q. You are a farmer now?
A. Yes, sir.

By Mr. Spratt:

Q. You called his attention to it twice, did you?
A. Yes, sir.

Q. The first about a car length, you say?
A. The other side of Hertel avenue. I told him the dwarf was against him.
Q. And the second time?
A. The second time when the caboose was about a car length of the dwarf.

Mr. Spratt: That is all.

JACOB P. KECK, was duly sworn as a witness on behalf of the defendant:

Direct examination.

By Mr. Spratt:

Q. Mr. Keck, you live in Buffalo?
A. Yes, sir.
Q. You are in the employ of the New York Central?
A. Yes, sir.
Q. In what capacity, Mr. Keck?
A. Well, now yard brakeman the last three years.
Q. Were you working for the company in 1908?
A. Yes, sir.
692 Q. And what was your position then?
A. Yard conductor.
Q. Were you working down with the engine that was switching in at the Kam malt house?
A. Yes, sir.
Q. Do you remember the accident in which Mr. Kinney was injured?
A. Yes, sir.
Q. Did you get a signal to put your engine in on the siding and clear the west-bound main track previous to the accident?
A. I was standing in the siding.
Q. At the time?
A. Yes, sir.
Q. And were you notified of the approach of the train on the west-bound track?
A. I didn't get that.
Q. Were you notified that you had to keep the west-bound track clear?
A. I was waiting there for passenger train No. 3, Michigan Central.
Q. To go west?
A. Yes, sir.
Q. And where were you standing at that time?
A. I was standing at Kam's switch on the end of the shed.
Q. Will you step to the map and point out to the jury where you were standing at the time of the accident and just before it?
A. Right here (indicating on map).

Q. Here (indicating) is the track and here (indicating) is the shed.

A. Here (indicating) is where I stood.

693 Q. Did you stand on that side of the track (indicating)?

A. This side of the track (indicating). This is the shed (indicating). Here (indicating) I stood.

Q. You stood there (indicating)?

A. Yes, sir.

Mr. Ward: Mark it. Put "K" on where he says now he stood.

Mr. Spratt: Here——

Mr. Ward: Don't point it out to him. If he is willing to say he stood in two different places on two different trials I think I am entitled to the benefit of it. Don't show it to him.

A. I was on the north end of the shed. This is the building over in here (indicating).

Q. Was it east of this track marked "Traffic?"

A. It was on the north end.

Q. Do you know where the dwarf 6 is?

A. I know about, yes.

Q. Where were you standing with reference——

A. That is, I don't know the numbers.

Q. The dwarf there between the "Y" tracks (indicating)?

A. Yes, that is the "Y."

Q. And this has been proved to be the dwarf 6 (indicating)?

A. Yes, sir.

Q. Where were you standing with reference to the dwarf?

A. Standing towards the north.

Q. How far away from the dwarf signal were you?

694 A. About 50 feet.

Q. As you stood, in which direction were you looking?

A. I stood in the position this way (indicating), the lamp behind me.

Q. You will have to describe it in the direction. Were you looking towards——

A. I was looking towards the south.

Q. And did you have in your view the main tracks and also the "Y" tracks?

A. Yes, sir.

Q. Will you tell the jury what you saw with reference to the movements on those tracks as you stood there?

A. The movement—I see the caboose and an engine come over the "Y" track about four car lengths before the collision, the Michigan Central coming up the main track about six car lengths. Then before the collision I throwed my eyes up, and I could see the semaphore for the west-bound main track, the top blade being down, the Michigan Central passenger train No. 3 had the right of way.

Q. Was there a light there so that you could see the arm?

A. I couldn't see the light.

Q. Were there electric lights about there?

A. The electric light was down at Hertel avenue near the New York Central main tracks.

Q. In what position was the arm?
A. The arm was down, the top blade.
Q. Did that give the Michigan Central train the right of way?
695 A. Yes, sir.
Q. About how fast were these two engines moving at the time you saw them?
A. Well, that kind of dropped out of my mind. I think the Michigan Central—I wouldn't say—but I think about 30 miles an hour.
Q. And about how fast was the freight engine moving?
A. I don't know.
Q. You can't recall?
A. No, sir.
Q. About how far was the freight engine from dwarf 6 at that time?
A. Four car lengths when I noticed it.
Q. What is that?
A. About four car lengths.
Q. Did you notice anyone on the caboose?
A. I saw a man swinging his lamp, a stop signal, swinging him up.
Q. At that time they were about four car lengths from the switch?
A. Yes, sir.
Q. The dwarf? In what way was he swinging? There is a lantern (indicating). Will you illustrate to the jury what you saw him doing?

(Witness illustrates by swinging lantern.)

Mr. Ward: He swings the lantern at right angles across his body up at the height of his hip, Mr. Spratt?
Mr. Spratt: Just a little above his hip.
The Witness: That is a stop signal.

Q. That is a stop signal, is it?
696 A. Yes, sir.
Q. Where was he standing at the time he was giving this signal?
A. Well, from where I was standing I took it he was standing on the caboose step.
Q. That is the way it appeared to you?
A. Yes, sir.
Q. Was it dark?
A. Well, medium.
Q. And state whether or not he continued to give that signal?
A. Until they struck.
Q. Until they struck?
A. Yes, sir.
Q. The stop signal all the time?
A. Yes, sir.
Q. Did you notice where the caboose went after the collision?

A. When the both engines come together, fell over, the caboose broke off and ran up the eastbound main track.

Mr. Spratt: You may examine.

Cross-examination.

By Mr. Ward:

Q. Mr. Keck, has your recollection about this law suit been refreshed any——

A. Sir?

Q. Has your recollection about this matter been refreshed any since you were sworn before?

A. I went over to Mr. Spratt and read my testimony over once. I have been over there twice since this last court.

697 Q. Did you read anything over besides your testimony?

A. No, sir.

Q. What has caused you to change your testimony?

A. I don't know that I changed it any.

Q. Well, let me call your attention to some things, Mr. Keck?

A. All right.

Q. You remember, don't you, this map which belongs to Mr. Spratt, and which has been brought here by him in this case at this time, and which has been in his possession ever since. Do you remember you put "K" on the map on the last trial, which shows where you stood?

A. I don't remember that I put that down there.

Q. Just come and look at that.

A. I don't remember it.

Q. Do you see there (indicating) at a point over, within 50 or 100 feet of the tower, and north of the shed? Do you see that?

A. That is north. That is south.

Q. No, this is north. North this way (indicating). This is towards Niagara Falls (indicating).

A. Here (indicating) is the "Y." Here (indicating) is Kam's. Here (indicating) is the shed and here (indicating) is where I stood.

Q. Now you have put a mark which is south of the shed?

A. South of the shed?

Q. Yes. See this needle here (indicating)? That shows which way is north.

698 A. That is the point. That is right.

Q. Then where you marked it this time is wrong?

A. That is wrong.

Q. And where I showed you is right?

A. That is right. Yes, north.

Q. All right. Let us take up some other matters.

A. That is right. I overlooked that.

Q. Now, Mr. Keck, when you say these two trains first you say that the Michigan Central was going about 30 miles an hour?

A. I would judge that that night, yes, sir.

Q. How fast do you thing Kinney was going—twenty?

A. I don't know any more.
Q. Four or five?
A. I don't know.
Q. You were in a good deal better position to see him than you were the Michigan Central, weren't you?
A. I could see both alike.
Q. How is it you can tell us how fast the Michigan Central was going and you can't tell us how fast Kinney was going?
A. Well, because he was going slower than what the Michigan Central was.
Q. A good deal slower?
A. Oh, yes.
Q. While the Michigan Central ran six car lengths Kinney ran four, didn't he?
A. Yes.
Q. So that would show that the Michigan Central was
699 going just once and a half times as fast as Kinney?
A. I presume so.
Q. That is the way it would figure out?
A. That is the way I took it.
Q. You told us on the other trial and you have told us now when you saw these two trains the Michigan Central was six car lengths away from the point of collision and Kinney was four?
A. I think that was my statement before.
Q. Now that I have called your attention to that you don't want to say that that Michigan Central was going 30 miles an hour, do you?
A. Well, to my estimation, as I took it, it was going 30 miles an hour.
Q. Kinney would have to be going twenty then?
A. I presume so.
Q. You don't claim that?
A. I don't know, I say.
Q. Now we will get to the next point. You say that you looked up and saw some signal that indicated to you that the Michigan Central had a clear track?
A. Yes, sir.
Q. Where was the Michigan Central when you saw that?
A. About six car lengths.
Q. That isn't when it was clear down the track, when you first saw the Michigan Central?
A. That was the other side of Hertel avenue, north.
Q. That is towards you from Hertel avenue?
700 A. Yes, sir.
Q. What it had been before that you don't know? That is the first time you had noticed the signal, wasn't it?
A. The first time?
Q. Yes.
A. The board was down—when I see the Michigan Central come along I throwed my eyes up and I see the board was down.
Q. That is the first time you had noticed it?

A. Yes, sir.
Q. You don't know when it was put down?
A. No, sir.
Q. Did you see what the dwarf was?
A. I couldn't see that, not there where I stood (indicating).
Q. The dwarf had an arm on it, hadn't it?
A. Yes, sir.
Q. Did you see the arm?
A. I was too far away from it.
Q. You were closer to the dwarf than you were to the high signal, weren't you?
A. Closer to the dwarf?
Q. Closer to the dwarf.
A. I don't know.
Q. This was in the night time, wasn't it?
A. Yes, sir.
Q. And the light on that high arm signal faced away from you, didn't it?
A. Faced south.
Q. You couldn't see any light?
A. I couldn't see any light. I don't know whether it was red or green or blue or yellow.
701 Q. When you saw that caboose coming around there you saw a man waving a lantern, didn't you?
A. Yes, sir.
Q. And he was waving that lantern at right angles across the track, wasn't he?
A. Across the track, as I stated before, outside of the caboose.
Q. He was waving the lantern at right angles across the track, wasn't he, Mr. Keck?
A. Yes, sir.
Q. And that is the only signal you saw him give, wasn't it?
A. That is all I see, the stop signal.
Q. You don't want to tell us, do you, Mr. Keck, that that man was on the steps of the caboose?
A. To may estimation, yes, sir.
Q. No. What did you see, not what you think now. What did you see?
A. I see him down at the end of the step is what I stated before.
Q. Did you see him on the step?
A. The position that he was standing I took it for granted he would be on the step?
Q. Did you see him on the step?
A. I don't know whether he was on the step, but it looked to me as though he was on the step.
Q. Didn't you always swear before that you didn't know what position he was in? Didn't you always swear before that you didn't know what position he was in, Mr. Keck?
A. Well, as I took it he stood on the step.
Q. No. You wouldn't want to change your story to help out anybody, would you, Mr. Keck?

702 A. I don't want to help either side. I will tell the truth. That is what I came up here for.

Q. You want to tell the same story every time, don't you?

A. Well, if I possibly can, as near as I can.

Q. Has anybody talked to you about saying that you saw this man on the step?

A. No, sir, not that I know of.

Q. Have you been asked to say that you saw the man on the step?

A. I believe one time—I think Mr. McEwen asked me that question if I saw anybody on the step, if I am not mistaken. Of course it is so long. I think I told Mr. McEwen I see a man on the end of the step, on the end of the caboose step swinging up.

Q. There is quite a difference between being on the end of the caboose and the end of the step?

A. Yes, there is a difference. You can put your foot up on the end sill.

Q. There would be quite a difference as to what the man back of him would see whether he was on the steps or on the end of the platform?

A. If he was on the end of the sill it was far better for the engineer to see him.

Q. Than on the step?

A. Yes.

Q. Let us see what you said before. You have got some glasses, haven't you, or do you read all right without them?

A. I think I have got some glasses.

Q. Did you have them on that night?

A. I didn't wear any glasses until the last two years my eyes failed a little.

703 Q. This is pretty good print (showing testimony to witness). We had this same discussion on the last trial we are having now, and did I call your attention to what you had sworn to before: "Q. Did you notice what position this man stood in, who was on the platform of the caboose? And did you answer 'A. No, sir.' A. I did not. Q. What? A. I didn't say he wasn't on the caboose. Q. Now do you read without your glasses, Mr. Keck? A. I can see it. Q. Did I read that correctly? A. You read it, no, sir, I didn't see him on the caboose. I said he was on the caboose, not on the platform—not on the platform, on the platform of the caboose. Q. Just listen to the question, Mr. Keck: 'Q. Did you notice what position this man stood in who was on the platform of the caboose?' And did you answer 'No, sir?' A. What position he was in then? Q. Yes. Now, just see if I read you that right. A. You read it right. Q. And did I read your answer right? A. You read my answer right. I didn't say 'No, sir.' I don't think that I said it, it might have been in the first when I was ill." Now, Mr. Keck, did you testify on the first trial that you didn't know the position the man was in?

A. On the first trial—I couldn't tell you anything about that.

I was ill at the time. I don't think I was responsible for what I said. I was ill three months.

Q. The first trial was about a year after the accident, wasn't it?

A. I presume so.

Q. You don't think you were responsible for what you said on that trial.

704 A. On the first trial. That is, not the whole of it.

Q. Do you want to swear the man was on the steps, or you think he was on the steps?

A. To my estimation, the way I took it, for granted that he was on the step the way he was giving the signal.

Q. He was on the steps?

A. It looked to me——

Q. Did you see him on the steps? You know whether you saw him on the steps?

A. It looked to me as if he was on the steps. I stated that before. I think that is in my statement before.

Q. Did you see him on the steps or do you just figure out he was on the steps?

A. It looked to me as though he was standing on the steps.

Q. Was he swinging his lantern across the north end of the caboose at right angles with the way he was going?

A. On the northeast end.

Q. Just——

A. The north end, yes, sir.

Q. This is an exact question, and I want an answer to it, because you were asked this exact question before. Was he swinging the lantern across the north end of the caboose at right angles with the way he was going?

A. Swinging up, yes, sir.

Q. Was he doing just exactly what I said? Was he swinging the lantern across the north end of the caboose at right angles
705 with the way that he was going? Now, you answer that yes or no, if you please?

A. Was he swinging?

Q. Was he swinging the lantern across the north end of the caboose at right angles with the way that he was going?

A. He was swinging up.

Q. Was that what he was doing, just what I read you?

A. Yes, sir.

Q. You were up in court on the first trial, weren't you?

A. No, sir.

Q. Oh, Mr. Keck——

A. The first trial?

Q. Yes.

A. I don't think so.

Q. You were up there before Judge Emery, took the stand and raised your right hand and were sworn to tell the truth?

A. Not the first trial.

Mr. Ward: I think you will stipulate, won't you, Mr. Spratt?

Mr. Spratt: He was ill, I understood, the first trial, and his testimony was taken on deposition at his house.

Mr. Ward: Jacob Keck, sworn for defendant, direct examination by Mr. Rourke, in the proceedings of the afternoon, page 599. Nothing there about taking his deposition at the house. If you don't care to stipulate it I will bring Mr. Haggerty in and prove it.

706 Mr. Spratt: I understood it was taken at the house.

Mr. Ward: You know by looking at your copy of the minutes just as well as I know.

Mr. Spratt: No, I don't know any such thing.

The Court: Proceed.

Q. Were you asked at page 606 this question: "Q. Did you notice what position this man stood in who was on the platform of the caboose?" And did you answer, "No, sir?"

A. Is that the first trial?

Q. Yes, that is the first trial.

A. That is the time I was sick.

Q. Is that your testimony?

A. That is the time I was ill. I might have said no, sir, in place of yes, sir.

Q. I read it correctly, didn't I?

A. Yes, you did.

Q. Is it false or true?

A. It should have been yes, sir.

Q. Is it false or true?

A. It is false.

Q. "He was swinging his lantern across the track?" "A. Across the north end of the caboose where he was standing." Did you answer that?

A. Yes, sir.

Q. Is that false or true?

A. That is true.

Q. That is true?

A. Yes, sir.

Mr. Ward: You are improving.

Mr. Spratt: I object to comments.

707 The Court: Yes, no comments.

Q. Then were you asked the next question: "At right angles with the way he was going?" And did you answer, "Yes, sir?"

A. Yes, sir.

Q. Is that true?

A. Yes, sir.

Q. So that the only thing that was false there was when you said you didn't know what position he was in?

A. Yes, sir.

Q. Why did you testify falsely on the first trial?

A. Well, I intended to say yes, sir.

Mr. Ward: That is all.

Redirect examination.

By Mr. Spratt:

Q. On reading the testimony here, I find on page 598 Mr. Rourke, who tried the case, says "With the exception of one witness who is ill, but whom I am informed by a physician can be here at 2 o'clock, with a carriage, we rest. I would like to have permission to call him then."

The Witness: That was the second trial, wasn't it? I was ill the first and second trials.

Mr. Spratt: Yes.

Q. Were you brought up here in a carriage at that time?

A. The second trial, yes, sir. I was ill at the time, yes, sir.

Q. Were you ill at that time when you were put on the stand?

708 A. Yes, sir.

Q. And in this case where you said—was that an error in your testifying, that Mr. Ward asked you whether it was false or true?

Mr. Ward: I object to that. The witness has characterized it himself.

A. It ought to have been yes, sir.

The Court: He said it was false.

Q. What did you mean by that?

The Court: Yes, you can ask him what he meant by it, if it meant anything different from what the language conveyed.

A. What I meant by that, I didn't think I was responsible in the pain that I had.

Q. It was an error? Was it intentional?

A. No, sir.

Q. If you said that you didn't intend to say it?

Mr. Ward: I object to that as leading and suggestive.

The Court: Yes, objection sustained.

Q. What did you mean, Mr. Keck?

A. What is it you want? I can't get what you mean.

Q. Was it intentional? Did you testify to something that you knew wasn't so?

A. No, sir.

Q. When you said he was swinging the lantern crosswise of the track, did you mean by that the direction?

Mr. Ward: I object to that as suggestive. He has gone over this on direct examination.

709 The Court: He can ask him what he meant.

Q. What did you mean by across the track?

A. Why, he reached out as far as he could between the two tracks.

Q. What was the direction of the motion?

A. For a stop signal,—swinging up.
Q. Was that the direction of across the tracks?
A. Between the two tracks.
Q. He was swinging between the two tracks?
A. The two tracks, yes, sir.
Q. And which side of the caboose was he swinging from?
A. On the northeast corner, on the northeast side.
Q. If he had got down on the lower step of the caboose would he have had about the same swing?
A. In place of what?
Q. Instead of standing out? He testified he stood at the end sill.

Mr. Ward: No, this fellow says he wasn't there at all. He was on the steps.
Mr. Spratt: I am asking him.

Q. Assuming he stood on the end sill how would that compare with the lower step as to the side of the car?
A. If he stood out on the end sill he had more of a chance to swing his arm out further because he would have his left hand to the brake wheel or wherever it was—that he had more of a chance that he wouldn't fall off.

Mr. Spratt: That is all.

710 Recross-examination.

By Mr. Ward:

Q. Now, Mr. Keck, you told me a part of this testimony that you gave on the first trial was true, didn't you? Some of it you have told us was true?

Mr. Spratt: I object to that as leading, suggestive and improper. He told you what he was mistaken about.
The Court: It can't be leading and suggestive on cross examination. He can suggest and lead all he pleases on cross examination.
Mr. Spratt: It is putting words in the witness' mouth which he never spoke.
The Court: The witness can say he didn't say it.

Q. You told me that a part of your testimony given on the first trial was true, didn't you, Mr. Keck?
A. Part of it, yes.
Q. Didn't you tell me before Mr. Spratt got at you here just now, didn't you tell me that this part was true: "Q. He was swinging his lantern across the track?"
A. Yes, sir.
Q. "A. Across on the north end of the caboose where he was standing?"
A. Yes, sir.
Q. Is that true? Do you still say that is true?
A. Yes, north end of the caboose.
Q. Do you still say that is true?

A. Yes, sir.

Q. "Q. At right angles with the way he was going? A.
711 Yes, sir." Do you still say that is true?

A. Yes, sir.

Q. Were you over to Brother Spratt's office this morning?

A. No, sir.

Q. When were you there last?

A. The last time I think it was last week Thursday.

WILLIAM C. GOULDING, was duly sworn as a witness in behalf of the defendant:

Direct examination.

By Mr. Spratt:

Q. Mr. Goulding, where did you live?

A. 837 Amherst street.

Q. You are an engineer in the employ of the New York Central?

A. Yes, sir.

Q. Were you the engineer on this New York Central train at the time of the accident?

A. Train 446, yes, sir.

Q. And you were coming from Niagara Falls to Buffalo?

A. Yes, sir.

Q. Do you know where Tower 55 is?

A. Yes, sir.

Q. Do you know where the Delaware & Lackawanna bridge is?

A. Yes, sir.

Q. Now, as you approach Tower 55 what is the first signal that you get for that tower?

712 A. What is called the home signal at Tower 55.

Q. Is there a distance signal at the D. L. & W. bridge?

A. Yes, sir.

Q. Is that the first one you saw?

A. That is the first one north of Tower 55.

Q. And that, I understand, is about 3,000 feet from the tower?

A. I don't know exactly. I should judge something like that.

Q. How is the track north of Tower 55 towards Tonawanda?

A. They are straight, straight track, level.

Q. And before you get to the Lackawanna bridge is it straight there too?

A. Yes, for quite a distance.

Q. A couple of miles?

A. I presume it is a couple of miles anyway. I wouldn't say exactly.

Q. As you came along there the night of the accident what was the first signal that you observed?

A. It would be the signal on the D. L. bridge that had anything to do with Tower 55.

Q. Did you see that signal that night?

A. Yes, sir.

Q. What was the color?
A. There was two green signals, two signals.
Q. What did that indicate to you?
A. That the signal at 55 would be clear.
Q. About how far from the D. L. & W. bridge were you when you noticed this green light?
713 A. Oh, probably half a mile or more. I wouldn't say exactly.
Q. When you got that light did you proceed by that signal?
A. Yes, sir.
Q. And what was the next signal that you observed?
A. It would be the signal at—the home signal at 55.
Q. And about where were you when you observed this signal?
A. After I passed the D. L. bridge.
Q. And how long did that signal hold for you?
A. At 55?
Q. Yes, the green signal.
A. It changed when I got probably 500 feet or more, something like that. I wouldn't say exactly.
Q. What was the signal when you first saw it?
A. The top green and the bottom red.
Q. It remained that until you got to where?
A. 500 feet, or may be a little more. I couldn't say exactly.
Q. Then what color did it become?
A. It went to danger, red.
Q. After that did you notice it?
A. I noticed it until I passed it.
Q. What color did it——
A. It stayed red.
Q. About the time that you noticed the signal change to red did you notice anything else unusual?
A. Well, after I—a short time after that went to red I no-
714 ticed some green lights appeared before me on the track.
Q. How many of those green lights were there?
A. Two, I believe.
Q. After that what occurred?
A. Why, I struck the caboose that the green lights was on.
Q. How long was it after you saw these green lights before you struck the caboose?
A. Oh, it didn't seem over a second or two. Almost immediately—just right after that.
Q. When you saw the signal change to red what did you do?
A. I applied the brakes and the emergency.
Q. About how fast were you running at the time?
A. Probably about 40 miles an hour.
Q. And did the brakes remain at emergency——
A. Yes, sir.
Q. Until the time you stopped?
A. Until we stopped.
Q. Did you notice what you had struck?
A. Well, it appeared to me as a caboose, as near as I could tell.

Q. What became of your train after you struck this caboose?
A. Why, we carried the caboose back past the signal and put it up on top of the Michigan Central engine which was laying on the side.

Juror No. 2: We can't hear the witness.
The Court: Speak a little louder.

715 A. We struck the caboose and carried it back past the signal and tower, and put it up on top of the overturned Michigan Central engine, which was laying on the east-bound track.
Q. How far down from the switch points of the "Y" was it to the point where your train stopped?
A. I should judge about, oh, 150 or 175 feet. I don't know. I couldn't tell exact.
Q. You ran by the switch points, did you?
A. Yes, sir.
Q. And you remained on the track, on the main track?
A. Yes, sir.
Q. You didn't turn in on the switch?
A. No, sir.
Q. Did the speed of your train diminish after you applied the brakes?
A. Yes, considerable.
Q. And you were able to stop when you got to the Michigan Central engine?
A. Well, the Michigan Central engine helped us stop. We came against the engine when we stopped.
Q. Does Hertel avenue cross your tracks a short distance below Tower 55?
A. Yes, sir.
Q. Was it your custom to slow down for that street?
A. We slowed down for that street about 6 or 8 miles an hour.
Q. At the speed you were going at what point would you have to begin to apply your brakes in order to slow down at Hertel
716 avenue, as you have described?
A. I just had my hand on the brake and was going to slow down for Hertel avenue when the signal went to red.
Q. After you stopped did you get off your engine?
A. Yes, sir.
Q. Where did you go? What did you do?
A. When I stopped the first I saw was a flagman got up on the engine, Michigan Central No. 3 flagman, and told me they had a wreck. I got down on the left side and went over to the first engine I saw, which I thought was the Michigan Central engine, and crawled up on top of the wheels—it was lying over on the side—and looked down in there, and there was hot water flying around there and I couldn't get in. I got back down again and walked around the front of the engine into the left side, into what would be the left side, and went into the gangway between the engine and tank, and as I stepped in I saw a man laying in the coal there.
Q. That turned out to be the New York Central engine that Mr. Kinney was on?

A. Yes, the New York Central engine that I had got to.
Q. Where was that laying?
A. That laid on what you might call the northbound track of the "Y," or partly on that. I don't know exactly.
Q. The most northerly track of the "Y?"
A. Yes, the most northerly.
717 Q. And found that the man was laying there, Mr. Kinney——
A. Laying in the coal with his head out.
Q. What did you do?
A. I reached down to look at him, to help him, and he caught hold of me and he said "I am fast." I looked up then and saw the two doors open, fire doors. I went in and shut those. Then I felt around to see if I could locate where he was fast, and I noticed that his both feet was under the coal buried. I couldn't get down to him. Then I began helping get some of the coal away, do what we could to get him out.
Q. Did you notice the dwarf known as dwarf 6?
A. No, sir.
Q. You didn't pay any attention to that?
A. Didn't pay no attention to it, didn't see it.
Q. You said that the home signal, the one near the tower, the top was green and the bottom was red?
A. Yes, sir.
Q. Which was your signal?
A. The top signal.
Q. What was the red signal for?
A. The red signal is the one that you get going into the "Y."
Q. And being red did that indicate it was set against the "Y" tracks?
A. Set against the "Y."
Q. And the switch was also set against the "Y?"
A. I suppose so. I didn't see it. I didn't notice the switch.
Q. You ran on your regular route?
718 A. I went on the straight route on the main track.
Q. And went by the switch?
A. Went by the switch.
Q. The red light would indicate that the switch was set for the main track, would it not, that you had the switch?
A. If I had the switch——
Q. I say this red light that you have spoken of, that was underneath the green, that would indicate——
A. That would indicate that the switch was set for the main, if that was red, the bottom.
Q. And against the switch?
A. Against the switch, yes, sir.
Q. Mr. Goulding, from the time you first saw the home signal—I think you said it was just after you passed under the bridge——
A. Passed the D. L. bridge, yes, sir.
Q. Until after the accident happened, did this light show red all the time?

A. The top signal, do you mean?
Q. The top signal showed green?
A. Showed green until I first saw it go to red.
Q. And what did the other one show?
A. The other one showed red.
Q. All the time?
A. All the time, yes, sir.

Cross-examination.

By Mr. Ward:

Q. So that there was a change in that signal, was there, before you reached the switch?
719 A. The top signal?
Q. There was a change in the top signal before you reached the switch?
A. Yes, sir.
Q. And that change occurred some time after you left the bridge and before you got up to the tower?
A. Yes, sir.
Q. And that was a change from a clear track to danger?
A. From green to red, yes, sir.
Q. You have been an engineer for quite a while, haven't you?
A. Pretty near about thirty years or over.
Q. If Mr. Kinney had a green light as he approached Hertel avenue he was perfectly justified in going out on that track, wasn't he?
A. I believe he had, if he had the signal.
Q. Your ordinary next stop is where after you passed this car? Where do you stop?
A. Black Rock station.
Q. That is how far from this point?
A. Oh, a mile or a mile and a half. I couldn't say exactly.
Q. Your last stop the other side is Tonawanda?
A. Tonawanda, yes, sir.
Q. You were a little late this day, weren't you?
A. About on time, I believe. I wouldn't say exactly. It wouldn't be a minute or two, I suppose.
Q. When you go by this tower ordinarily you go 35 or 40 miles an hour?
720 A. When I pass the tower we are slowing up there. We have the brakes on passing the tower.
Q. If that signal was at danger, Mr. Goulding, that signal on the bridge down there, instead of clear, you would still come up to the tower, wouldn't you?
A. If it was at danger?
Q. Yes.
A. I would stop at the bridge. Then come up to the tower.
Q. All the difference is that you would come slow instead of fast?

A. Yes.
Q. This time you saw it was clear?
A. Both clear, both lights.
Q. So that you were coming at your usual rapid rate of speed?
A. Regular speed, schedule speed.
Q. At the time that you saw this signal change from clear to danger you were going in the neighborhood of 40 miles an hour, weren't you?
A. About that.
Q. And you almost immediately struck the caboose?
A. Well, it was a second or two. I wouldn't say exactly. Shortly after, very shortly.
Q. But you didn't smash up the caboose?
A. I believe I did break it up some. I didn't——
Q. It didn't knock it off the track?
A. Not until we got to the engine, Michigan Central engine.
Q. Your train, going at that rate of speed, met this caboose going in the opposite direction?
721 A. Yes, sir.
Q. And brought it back to the wreck?
A. Yes, sir.
Q. Without derailing it?
A. I presume so, as it went right straight along.
Q. Brought it back six or seven hundred feet or more, didn't you?
A. Yes, sir, about that.

Mr. Ward: I think that is all.

Redirect examination.

By Mr. Spratt:

Q. Do you know what the effect is of a car breaking or crossing against the signals from one track to the other, what effect that has on the signals?
A. A car which—I don't understand you.
Q. Take a car or caboose that goes on the track against the signals, what effect does that have as it crosses one track to the other, with reference to the signals?
A. Do you mean what route would it take?
Q. No, I meant what effect does it have on the signal?
A. On the signal?
Q. Yes.
A. If they are inter-locking electrically they will go to danger, I believe.
Q. This was an inter-locking electric signal, so far as the main track was concerned, wasn't it?
A. I believe it was.
Q. So that if the caboose was forced out there across the tracks

on the main track against the switches and against the
722 signal lights, that would have the effect of changing the signals, would it?

A. Putting the signals to danger.

Q. From green to red?

A. Yes, sir.

Q. So that if that caboose was forced out across the tracks against the switches and against the lights, the lights would change on the main track, would they not?

A. Yes, sir.

Q. To danger?

A. Yes, sir.

Q. Your train was all connected up with air, wasn't it?

A. Yes, sir, I believe it was.

Q. And you applied the emergency to the whole train?

A. Yes, sir.

Mr. Spratt: That is all.

Recross-examination.

By Mr. Ward:

Q. You were going 35 or 40 miles an hour when you hit the caboose, weren't you, Mr. Goulding?

A. Well, I had reduced from 40 quite considerable when I struck the caboose.

Q. Have you testified you were going 35 to 40 miles an hour when you struck the caboose?

A. I don't just remember.

Q. Do you say that is about right now?

A. If I did——

Q. I don't want to bother you with this testimony unless you tell something radically different.

A. I can't tell exactly the reduction I made, but I reduced considerable.

723 Q. Wouldn't you say it was somewhere between 30 and 40 miles an hour you were going when you hit the caboose?

A. It must have been that. I wouldn't say exactly.

Mr. Spratt: I will read the testimony of Mr. Edwin R. Sayer, who was the fireman on engine with this last witness.

Mr. Spratt read as follows:

"Edwin W. Sayer, called by the defendant and sworn, testified as follows:

"Direct examination.

"By Mr. Rourke:

"I live at Buffalo and am a locomotive engineer in the employ of the New York Central. I was promoted to a locomotive engineer

in December, 1908. I was firing on October, 1908. I remember the night of the 12th of October, 1908. I was on train 446, Niagara Falls. My engineer was W. C. Goulding. I run from Niagara Falls to Buffalo, as he testified. That was a regularly scheduled train. I remember the approach of our train to Tower 55, so-called. I was familiar with the signals that were displayed governing our movements, towards that tower. The first signal which controlled us for that tower was on the D. L. & W. bridge. That is the bridge that is some considerable distance to the west of Tower 55. The next signal was at Tower 55. The tracks are straight from
724 the Delaware bridge towards Tonawanda for some distance. I remember approaching our first signal on that night and I observed it before we approached the Delaware bridge. Its color was green. That indicated to me a clear track. I observed the second signal at Tower 55 when I observed that, I presume I was about eight hundred feet west of the signal, that is towards the bridge. Its indication was green; that indicated to me a clear passage by 55. The next that happened out of the ordinary was when the signal at Tower 55 went to danger. I should think I was about five or six hundred feet away from it. We next hit a caboose shortly after the signal went to danger. We collided with it. I stayed on the engine. We pushed the caboose down ahead of us against the Michigan Central engine. The Michigan Central engine lay on the east-bound track. That was opposite where Kinney's engine lay. We carried the caboose over the switches to where the Michigan Central engine was. Our engine was not derailed. When we struck the Michigan Central engine was when the caboose was telescoped across. I was not injured. I saw the caboose almost immediately after I saw this signal fly to danger."

Mr. Flynn reads cross examination as follows:

"Cross-examination.

By Mr. Ward:

"When I first saw the caboose I presume we were about five or six hundred feet west of the signal. I could not tell just where the caboose was. I presume likely it was about five or six hun-
725 dred feet away. At the time I first saw the caboose, it was down where the collision had occurred or at the signal. And the caboose came toward us and we went toward it. We were going thirty or forty miles an hour.

Q. The caboose did not go any such rate of speed?

A. I can't tell. When we struck the caboose, it was from one hundred to one hundred and fifty feet from the point of collision, I should judge, I don't know that I testified at the last trial it was two hundred. I was asked this question: 'What happened? A. We collided with the caboose and after coming on probably two hundred feet we came against Michigan Central engine overturned on the east-bound track.' We must have shoved the caboose that distance."

Mr. Spratt read the re-direct examination as follows:

"Redirect examination.

By Mr. Rourke:

"I made no accurate measurements of this distance there. It was simply my estimate of what they were."

Mr. Spratt: I will now read the testimony of Stephen E. Quinlan, engineer of the Michigan Central train, who is dead now.

726 Mr. Spratt reads Direct Examination of STEPHEN E. QUINLAN, as follows:

"Direct examination.

By Mr. Rourke:

Q. Where do you reside?
A. St. Thomas, Ontario.
Q. What is your business?
A. Locomotive engineer.
Q. By what company are you employed?
A. Michigan Central Railway Company.
Q. How long have you been a locomotive engineer?
A. 26 years.
Q. Does the Michigan Central operate its trains into the City of Buffalo?
A. Yes, sir.
Q. And they are operated over the tracks of the New York Central, as I understand?
A. Yes, sir.
Q. How long have you been so operating trains of the Michigan Central into Buffalo?
A. 16 years.
Q. You are familiar then with the tracks of the New York Central from Niagara Falls to Buffalo?
A. Yes, sir.
Q. Is that the place where the Michigan Central enters and leaves?
A. Niagara Falls and Suspension Bridge is one place.
Q. And down here at the International I suppose is another?
A. Yes, sir.
727 Q. Do you remember the 12th day of October, 1908?
A. Yes, sir.
Q. What train did you have charge of that day for the Michigan Central?
A. Michigan Central train No. 3.
Q. What character of train is that?
A. It is a fast passenger train.
Q. And you was its engineer?
A. Yes, sir.

Q. Who was your fireman?
A. Russell Oaks.
Q. Did you leave Buffalo that night on your regular time?
A. Yes, sir, we left on time. About on time.
Q. And your run was where? How far was you to run the engine?
A. I run the engine to St. Thomas by the way of Niagara Falls.
Q. You were engineer this night as you approached our Tower 55?
A. Yes, sir.
Q. Do you know where Tower 55 is located?
A. Yes, sir.
Q. That is at or near Buffalo Junction?
A. Yes, sir.
Q. What is the tower just immediately to the west of that? I am speaking west now, according to time card direction. To the west of Tower 55?
A. That is Tower "H."
Q. And the towers continue on, do they not, to the station?
728 A. Yes, sir.
Q. Under different numbers or letter designations?
A. Yes, sir.
Q. As you approached Tower 55 this night were there any fixed signals provided there to govern your movement?
A. Yes, sir.
Q. Where was the first signal located that indicated to you the condition of Tower 55?
A. At the Erie crossing the first fixed signal.
Q. Was the first fixed signal?
A. Yes, sir.
Q. The Erie crossing is designated by the point marked here on the map?
A. Yes, sir.
Q. Which is just a little bit north or west of Tower "H"?
A. Yes, sir.

By the Court: That would be just west the way we have been reading the map?

Q. That would be just west of Tower "H?"
A. Yes, sir.

By the Court: Do not confuse it. You started in by saying you would read that map as the trains running east and west on the main track left it was almost the reverse. Let's stick to it.

Q. That signal would be just west of Tower "H?"
A. Yes, sir.
Q. The track you were running on to Niagara Falls is what is known as the west-bound track?
729 A. The right-hand west-bound track.
Q. Right-hand west-bound track?
A. Yes, sir.
Q. The first signal that you obtained then was signal No. 1?
A. In connection with tower 55 signal?

Q. Yes.
A. Yes, sir.
Q. Did you observe that signal before you reached it?
A. Yes, sir.
Q. At what point did you first observe signal No. 1? About where were you?
A. At a point quite a distance east of Tower "H."
Q. That is you could see the signal some considerable distance before you reached it?
A. Yes, sir.
Q. From the time you came in view of it what was its indication?
A. Clear. Green lights.
Q. A green light?
A. Yes, sir.
Q. What did that indicate to you?
A. Clear track. Right of way.
Q. Did you expect to get another signal at Tower 55?
A. Yes, sir.
Q. That was called what? The home signal?
A. The home signal.

By the Court: 55.

Q. Is that located on the map, its location indicated on the map as number 2?
730 A. Yes, sir.
Q. That is just east of the tower?
A. Yes, sir.
Q. And in the crotch between the two tracks?
A. Yes, sir, of the "Y."
Q. Are those signals interconnected?
A. Yes, sir.

By the Court: Which ones?
By Mr. Rourke: The one and two.
By the Court: Tower 55, where is one and two?
By Mr. Rourke: Here (indicating).

A. This is not connected with the tower only with electricity.
Q. There is electric connection between one and two?
A. Yes, sir.
Q. Number one signal is the high signal, is it not?
A. Yes, sir.
Q. Number two also is a high signal?
A. Yes, sir.
Q. When number one signal is clear that is an indication to you it is also clear at two?
A. There is two arms on number one signal. The top arm is clear and the lower arm is the indication of the position at Tower 55 home signal.
Q. How is that?
A. Clear.

Q. Which indicated to you the home signal was clear?

A. Yes, sir.

731 Q. Which indicated to you that the track was clear for you to pass 55 to Niagara Falls?

A. Yes, sir.

Q. About what was your speed, Mr. Quinlan, as you approached Tower "H?"

A. I was running probably about 12 or 15 miles an hour.

Q. What was your speed as you approached Hertel avenue?

A. About the same.

Q. 12 to 15 miles an hour?

A. Yes, sir.

Q. After you passed number one and approaching Hertel avenue did you have in view all the time signal number two?

A. Yes, sir.

Q. You could see that before and after you passed number one?

A. Yes, sir.

Q. At any time after you passed number one did signal No. 2 change?

A. No, sir.

Q. What was its color?

A. Green.

Q. That indicated what?

A. Clear track.

Q. For you?

A. For me. Right of way.

Q. Did you slow up at Hertel avenue?

A. No, sir. Just the same speed as I was coming along there at that time?

Q. After you got to Hertel avenue did you increase your speed?

732 A. Yes, sir, I started to increase the speed of my train there.

Q. Did you observe any movement of an engine or train upon the tracks of the "Y?"

A. Not until after I got pretty close up there. I saw no movement of a train on there, no, sir.

Q. Did you see Kinney's train on there?

A. No, sir.

Q. What time did you first observe it?

A. Just pretty near to the point of the accident, just near the home post number two I saw the outlines of an engine. I thought it was standing, and almost the same time I thought it was moving, and then I immediately put on the emergency feature of the automatic brake. I shut the engine off and opened the sand lever and at that time we had the collision. I done everything I could possibly do to stop.

Q. You have frequently seen trains, as you have been approaching, standing upon that track?

A. Yes.

Q. They have waited there for you to pass?
A. Yes, sir.
Q. And you say your first impression was that this train was standing?
A. Yes, sir, when I first saw him I thought he was standing.
Q. The next impression was he was crossing your path?
A. That he was moving and I thought then he might foul me.
Q. Had you your signal up to that time?
733 A. Yes.
Q. And had had it all the way from tower "H?"
A. All the way after I first came in view of it.
Q. What happened to that engine?
A. My engine tipped over and I was still on the seat. I hadn't time to get off. My engine tipped over on the east-bound track and I had rolled down off from the seat and onto the fireman. The fireman was just getting up about the time I fell down.
Q. Did your engine go over on the side?
A. Yes, sir, right over on the side.
Q. And fell over the east-bound track somewhere opposite where he cornered or kitty-cornered you?
A. Yes, sir.
Q. And to the east of the switch that connects with the east-bound track?
A. Yes, sir.
Q. Were you injured?
A. No, sir. Not to amount to anything. Just shaken up badly was all.
Q. Your fireman also went over with the engine?
A. Yes, sir.
Q. What did you do to get out? Were you caught in any way?
A. No sir. The fact of the tank not following my engine saved us from being caught in there.
Q. The tank did not go over?
A. No, sir.
734 Q. Then your engine separated from the tank?
A. Yes, sir.
Q. The tank remaining upon the rail?
A. Yes.
Q. And your engine proper turning on its side?
A. Yes, sir. Turning on its side on the east-bound track.
Q. And you were thrown on the fireman's seat?
A. Yes, sir. Which lay on the left-hand side.
Q. Did a caboose come into your engine?
A. I found out afterwards. I will explain that. When it tipped over and I fell down just about the time I was picking myself up I felt another jar about on the engine, and I didn't know what it was, until after I got out and went on the north side of the engine and went west then and saw a way car on my engine and another engine headed right into me.
Q. So the jar came and the caboose was piled onto your engine before you got out of the cab?

A. Yes.
Q. Were you rendered unconscious by the fall in any way?
A. No, sir.
Q. You got out as quick as you could?
A. Yes, sir.
Q. When you got out the caboose was piled onto your engine and the passenger train from Niagara Falls into that?
A. Yes, sir.
Q. What character of train were you running?
A. Fast passenger train.
735 Q. That carried day and sleeping coaches?
A. Yes, day coaches and sleeping coaches.
Q. How heavy a train was it?
A. A very heavy train, the Falls. There was not very many cars but the train was covered and all vestibule cars.
Q. Your engine was of a large type?
A. Yes, sir.
Q. I think I asked you. What did you do to stop?

By the Court: He said he did everything.

A. I used the emergency and the automatic air brakes and sand, that was all I had in my power, to stop.
Q. You did not throw back your reverse lever?
A. No, sir. It was not necessary.
Q. Up to the time of this collision were those signals clear for you?
A. Yes, sir.
Q. Are you positive of that?
A. Positive."

(Mr. Flynn reads cross examination of Mr. Quinlan as follows:)

"Cross-examination.

By Mr. Ward:

Q. Your passenger train went from Buffalo to Niagara Falls, did it not?
A. We went that way, yes, sir.
Q. That is your regular run?
A. Regular run to St. Thomas.
Q. Where do you make your first stop after you leave the
736 New York Central station on Exchange street?
A. There is no regular stop between there and Niagara Falls.
Q. This is one of the fast through trains?
A. Yes, sir.
Q. And your running time from the New York Central station, Exchange street, to Niagara Falls, is how much?
A. 40 minutes.
Q. How many miles is it?
A. To Niagara Falls or Suspension Bridge?

Q. Whatever it takes the forty minutes to run.

A. About 21 miles.

Q. So you had to go something over 30 miles an hour to make your time?

A. On an average, yes, sir.

Q. At the point of this accident you have a clear track ahead of you for several miles, have you not?

A. Yes, sir. To Tonawanda.

Q. And you had a clear track back of you for how far?

A. I couldn't say that. I don't know what was following me.

Q. I mean a straight track. I did not mean a clear track, as you railroad men call it. A straight track?

A. There is a slight curve right there at the Erie crossing. Back of that is a straight track clear east of Black Rock.

Q. Ordinarily when your train is on time and you have
737 the right of way you go along there without interruption or trouble?

A. Yes, sir.

Q. You have to make time?

A. If my signals are all clear we do.

Q. And you were traveling at your usual rate of speed on this night?

A. Yes, sir.

Q. The first signal that is operating by interlocking movement to show a position of these switches it is signal number two, is it not?

A. Yes, sir.

Q. And that signal number two is not visible to you until after you pass the junction of the Erie tracks and main line tracks?

A. Yes, sir, you can get it before that.

Q. Did you on this occasion?

A. I got it somewhere around there. By looking across we can locate it.

Q. You were looking first for this number one signal, were you not?

A. Yes, sir.

Q. And that signal is also a light signal, up in the air, and directly in the course you were traveling towards number two signal?

A. Yes, sir.

Q. So that your view of number two signal in the night time is not very clear until number one signal has been passed, is it? That is true, is it not?

A. You could see it by looking across. A man that is accustomed to knowing where they are he can locate. Which we will and do.

738 Q. You are under no obligation to locate that until you pass number one signal?

A. Yes, we are.

Q. Was your train running so fast it would take half a mile to stop it?

A. No, sir. It is our duty.

Q. It is also your duty to keep track when you come to interlocking switches and crossovers?
A. No, sir, we are governed by signals.
Q. You do not look at anything else but signals?
A. Oh, yes, we take everything in the limits of vision.
Q. This number two light you were looking for, this high light, is that the light shown in the picture there?
A. No, sir, it is not shown in that picture.
Q. It is a similar light to that of the same size and same size as the one arm pole?
A. As this one here?
Q. Of the same height as the lower arm?
A. Yes.
Q. About the same size?
A. Yes.
Q. This light that you can see so far is how big?
A. It is a regular size semaphore light. I don't know just the size of the circumference of the light.
Q. What is the diameter of that light?
A. I couldn't say what it was.
Q. It is not more than three or four inches, is it?
739 A. Oh, yes.
Q. How much would you say?
A. About that big (indicating).

By the Court:

Q. That is No. 2 you refer to?
A. Yes.

By Mr. Rourke: How big?

By Mr. Ward (resuming):

Q. Give it in inches?
A. In circumference?
Q. No, diameter. Across?
A. It would probably be about I should judge seven inches.
Q. Across?
A. Yes, sir.
Q. As you look down towards that light from number one light in addition to that light up high on the pole there were some three others, four other high lights on poles in that neighborhood, was there not, similar lights?
A. Not in line. There was another one at the semaphore just west of Tower 55.
Q. Number 12 is a pole with two arms on it exactly in line?
A. Yes, sir.
Q. Immediately across the track is 14 and 15?
A. That's for east-bound trains. That shows no light——
Q. That is a high light?
A. Yes, sir. That is governing east-bound trains and shows no light against trains coming in the opposite direction.

740 Q. There is a pole with a light on it, number five, a short distance toward the bottom of the diagram on this map. That shows in your directions?

A. That is in such a position that we do not see it.

Q. So the only one directly in line is that one in 12?

A. That's a little higher than number 2 light.

Q. Has the same size of light and same color of light?

A. Yes, sir.

Q. Your position was on the right-hand side of the cab, the same as it is on the New York Central?

A. Yes, sir.

Q. As you came along there, as I understand you, your senses were held and it was your business to see everything that had anything to do with your train arrangement or track?

A. Yes.

Q. Of course you were looking around?

A. Yes, sir.

Q. In this space between the "Y" track and the track on which you were running there were no buildings or obstructions?

A. No, sir.

Q. At Hertel avenue on the crossing that you went over and the crossing that the "Y" went over were electric lights?

A. Yes, sir.

Q. And they were lighted at that time?

A. I think they were.

741 Q. You had an uninterrupted view from the time you crossed the Erie track until you reached the "Y" track of the point of collision if you had chosen to look that way?

A. Yes, sir.

Q. And you were on the side of the engine towards that direction?

A. Yes, sir.

Q. Your engine was equipped with a whistle and bell, was it not?

A. Yes, sir.

Q. Did you use either of those methods of giving warning as you approached this intersection?

A. No, sir, not that I rememebr of. I might for Hertel avenue.

Q. Where was your engine when you first saw Mr. Kinney's engine?

A. I was just about an engine length east of signal 2.

Q. That is towards Buffalo?

A. Yes, sir.

Q. The way you were coming?

A. Yes, sir.

Q. And signal number 2 is about 150 feet from the point of collision, is it not?

A. Probably 50 feet from the signal. Where I was from the signal.

Q. You were 50 feet from the signal?

A. Yes. When I first saw the outlines of an engine.

Q. Of course you continued on until the point of the collision, using your best efforts to check your speed over that interval?

A. The next impression was I saw he was moving. That was the time.

742 Q. Had you proceeded any distance from when you first noticed until you tried to stop?

A. Oh, yes.

Q. Where was your engine when you tried to stop it?

A. I was just a little past the signal, I couldn't state the number of feet.

Q. Did you make any effort to warn him of your approach?

A. No, sir, because I never thought he was going out. I couldn't.

Q. At the time you saw him where was his engine in reference to the point of collision?

A. When I first saw him I thought he was standing clear. But the next impression I thought he was moving and I knew he was close to the point then.

Q. Did you see that caboose?

A. No, sir, I didn't see the caboose. There was no lights visible.

Q. You saw lights in the engine?

A. No, sir, I didn't see any lights visible on the engine.

Q. Was his engine ahead of you on the cross-over when you saw it?

A. Yes, a trifle.

Q. His engine was moving very slowly?

A. Just a little. I couldn't say it was when I struck it.

Q. It was moving so slowly when you first saw it that your impression was first that it was standing still and then you thought it was moving slow?

A. Yes.

743 Q. Then it could not have been moving very fast while you were traveling over this distance?

A. No, sir.

Q. So, when you first saw this engine it was almost practically ahead of you on the crossover?

A. No, sir.

Q. Wasn't the caboose on the crossover?

A. I didn't see the caboose whatever.

Q. Where were you looking?

A. I was watching his engine and I made all the efforts to stop.

Q. Were you looking ahead until that time?

A. Yes.

Q. How do you account for not seeing the engine or caboose?

A. On account of no lights being visible, and if I had seen him I wouldn't have thought he was going out, because I had clear signal.

Q. If Mr. Kinney had clear signal he had a right to go out there?

A. Yes, sir.

Q. Just as much right as you had?

A. Yes, sir.

Q. What do you think your rate of speed was now as you went along there? What do you say now, Mr. Quinlan, that your rate of speed was at the time you came down to this point of collision?

A. I said my rate of speed was about 12 or 15 miles an hour, up to Hertel avenue. I had increased the speed from there to probably 18 miles an hour or 20.

Q. You were sworn on the last trial of this case by the defendant?

744 A. Yes, sir.

Q. Did you in response to a question, (400) did you in response to a question how fast you were going reply "I presume about 20 miles an hour"?

A. Probably maybe I did. I said 18 or 20 miles an hour.

Q. Didn't you say 20 miles an hour at the last trial?

A. Probably I did.

Q. If you said so it was true?

A. Yes, sir, near as I could judge.

Q. That was much nearer the time of the accident than this is?

A. Yes, sir.

Q. Did you testify on the last trial that you did not observe this signal at tower two until you were about to Hertel avenue?

A. No, sir.

Q. When you reached Hertel avenue it was your duty to look in either direction to ascertain whether there were trolley cars coming. That is, you looked to the right and your fireman to the left, I suppose?

A. Yes, sir.

Q. And as you passed over Hertel avenue you turned your head to the right and glanced in the direction of the "Y" tracks and along Hertel avenue?

A. I don't know as I turned my head. That comes within the limit of vision.

Q. Did you see Mr. Kinney's engine then?

A. No, sir.

Q. It was there then?

745 A. Not at that point.

Q. It was somewhere between Hertel avenue and the point of collision when you crossed Hertel avenue, was it not?

A. Yes, sir, must have been.

Q. And it was going at such a rate of speed that if you had blown a whistle to indicate your presence it could have been stopped, could it not?

A. I couldn't say that. I did not expect to be going out there.

Q. At the rate of speed at which it was travelling when you saw it it could have been stopped almost instantly?

A. Yes, it could have been stopped.

Q. There is a recognized signal that engineers have to indicate they are coming and other people must get out of the way?

A. No, sir.

Q. If you had seen Mr. Kinney there what signal would you have given him?

A. I would not have given him any unless I had a signal from another train.

Q. If you had seen Mr. Kinney's crossing signal for that track?

A. Then I could not have had them.
Q. Supposing you both had them what would you have done?
A. I would have kept right on going because that signal gave me the right of way. We could not both. We both could not have both.
Q. So the engineer who sits in his engine has got to be governed by the man who gives the signals?
746 A. He has got to be governed by the signals. Yes, sir.
Q. And if he gets those signals he must go ahead?
A. If the signal is for him to proceed it gives him the right to proceed."

(Mr. Spratt read the re-direct examination of Mr. Quinlan as follows):

"Redirect examination.

By Mr. Rourke:

Q. But knowing the operation of signals as you did it was no indication to you when you were at No. Two clear and the train moving on the 'Y' to suppose that he would not stop?
A. No, sir.
Q. And you know they are so constructed that they cannot conflict?
A. That is what I understand.
Q. That is your experience in your engineering?
A. Yes, sir.
Q. So if you saw No. 2 clear that was indication to you that he was passing toward a danger signal?
A. Yes.
Q. And until he had passed the fatal point and right ahead of you you had no reason to believe he would pass over?
A. Yes, sir.
Q. That is the reason for interlocking signals?
747 A. Yes.
Q. So conflicting movements cannot be made?
A. No, sir.
Q. So there was no reason for your whistling at him?
A. No, sir.
Q. Because you assumed if your signal was clear his must be at danger?
A. Yes, sir.
Q. And that Kinney would observe it?
A. Yes, sir.
Q. And it was only when you saw the actual obstruction of the track, or nearly so, that then you attempted to stop your train?
A. Yes, sir, when I saw there was going to be a possible accident I done every thing I could then to stop it.
Q. I suppose at that moment you did not know what was going to become of you. You shut off your engine?

A. Yes, I put the emergency on first and put the sand on. That was all I could do.
Q. It did not occur to you that tooting of the whistle would help stop the engine at that time?
A. No, sir."

(Mr. Spratt read the cross-examination by Mr. Ward of Stephen E. Quinlan, recalled:)

748 "STEPHEN E. QUINLAN, recalled by defendant, testfied as follows:

Cross-examination.

By Mr. Ward:

Q. You wear glasses sometimes, do you not?
A. Just for close reading.
Q. Did you have them on this night?
A. No, sir. I don't wear them for limit vision."

(Mr. Spratt read the re-direct examination.)

"Redirect examination.

By Mr. Rourke:

Q. Have your eyes been regularly tested?
A. Yes, sir.
Q. I will ask you a question about those signals. Mr. Ward said something about the signals upon this tower. These signals are so constructed so they shine only one way?

By Mr. Ward: I object to it as leading.

A. That's all.
Q. That is the signals displayed to a train coming from the Falls are dark to a train coming from Buffalo?
A. Yes, sir."

(Mr. Spratt read the recross-examination.)

Recross-examination.

By Mr. Ward:

Q. Did they get up in Tower 55 right after accident?
749 A. No, sir.
Q. You did not go up there at all?
A. No, sir.
Q. Did you make a statement right then and there to Mr. McEwen?
A. No, sir."

(Mr. Spratt read the re-direct examination).

"Redirect examination.

By Mr. Rourke:

Q. Did you observe dwarf signal No. 6 right after that?
A. No, sir. When I went around I went to assist Mr. Kinney from under his engine.
Q. You did not observe this dwarf signal?
A. No, sir."

Mr. Spratt: I will read the testimony of Russell F. Oakes, his fireman, also dead.

"RUSSELL F. OAKES, called by the defendant and sworn, testified as follows:

Direct examination.

By Mr. Rourke:

Q. Where do you live?
A. St. Thomas, Ontario.
Q. Little louder than that. What is your business?
750 A. Locomotive engineer.
Q. For what road?
A. Michigan Central.
Q. What was your occupation in October, 1908?
A. The same. But I was firing at that time.
Q. You were firing?
A. Yes, sir.
Q. And since then you have been promoted?
A. I was promoted previous to that.
Q. But you were back firing at this time?
A. Yes, sir.
Q. Were you operating train No. 3?
A. Yes, sir.
Q. Who was your engineer?
A. Stephen Quinlan.
Q. On the night of this wreck. That is the last witness here?
A. Yes, sir.
Q. You remember this wreck, of course?
A. I do.
Q. You were the fireman on number three engine?
A. I was.
Q. Did you receive some injury?
A. Not to amount to anything.
Q. But your engine was turned over on this night at Tower 55 by collision with the engine Mr. Kinney was running?
A. Yes, sir.
Q. Your duty on the train was that of firing?
A. Yes, sir.
Q. What were you doing at the time of the collision?

751 A. Putting in a fire.

Q. Where did you start to put in your fire? What point on the road? This particular fire you were putting in?

A. Probably about halfway between Tower "H" and Hertel avenue.

Q. And you continued to busy yourself with your fire until the time of the collision?

A. Yes, sir.

Q. You knew nothing of it until your engine tipped over?

A. No, sir.

Q. Before you approached Tower "H" did you take any note of signals?

A. Yes, sir.

Q. That is the signals governing the movement of your train?

A. At Tower "H."

Q. What were they?

A. Clear.

Q. Does that indicate the green light?

A. Yes, sir.

Q. Which indicates the track was clear for you?

A. Yes, sir.

Q. Where was that light?

A. At Tower "H."

Q. What signal did you observe, one or two, or both?

A. The one.

Q. No. 1.

752 A. No, sir, the signal governing No. 1 through Tower "H," which is east of Tower "H." I did not see the signal at Tower "H."

Q. Oh, I misunderstood you. You took an observation of signals before you reached Tower "H?"

A. Yes.

Q. But you took no observation after that?

A. No, sir.

Q. You were engaged in firing?

A. Yes, sir.

Q. At the time of the collision?

A. I started firing halfway between Tower "H" and Hertel avenue.

Q. Did you observe the signal at the Erie crossing?

A. No, sir. I did not think it was necessary. I was told it was clear.

Q. Who by, the engineer?

A. Yes, sir.

Q. When your engine tipped over on the east-bound track, as I understand it?

A. Yes, sir.

Q. At the time of the collision. Were you thrown out or did you go down in the cab with the engineer?

A. No. I went onto the ground.

Q. Do you remember the caboose from the other way being thrown upon the engine?

A. I saw it afterwards.

Q. Did you feel it strike?
A. No, sir.
Q. Were you thrown clear of the engine when it went over?
A. I fell between the two tanks near the track.
753 Q. So you did not observe the caboose come onto your engine?
A. No, sir.
Q. Were you unconscious?
A. No, sir.
Q. When you got up did you see the caboose there?
A. No, sir, I didn't look for the caboose.
Q. You knew there was a light. You saw the fire there afterwards, did you? You saw the caboose on fire there?
A. Yes, sir.
Q. It burned up on top of your engine?
A. Yes, sir."

Mr. Spratt: I will read the testimony of Frank M. Doran.
Mr. Ward: Is he dead?
Mr. Spratt: I thought the understanding—Mr. Huntington says he is alive.
Mr. Ward: Just state your reasons for not producing him.
Mr. Spratt: I understand he would testify just the same as he has testified.
Mr. Ward: Was it read before?
Mr. Spratt: Yes.
Mr. Ward: All right.

754 (Mr. Spratt read the direct examination as follows):

"FRANK M. DORAN, sworn on behalf of the defendant:

Direct examination.

By Mr. Rourke:

In October, 1908, I was wrecking master for New York Central. The duties of wrecking master are to take charge of the clearing up of all wrecks. There was a wrecking outfit maintained here in Buffalo by this railroad company, managed by a crew of wreckers.

I remember this night of October 12th and the wreck at Tower 55. We received a message about 8.45 p. m., to go there at once, that both main tracks were blocked on the Falls branch. I went to North Buffalo Junction with my wrecking outfit. I got there at 9.40 p. m. I took observations of the position of the engine and work that had been done in clearing the wreck. We shoved down there with the crane ahead, and I told my assistant to get chains ready to make a hitch and walked around the tank and found the way that Mr. Kinney was laying, to see that we wouldn't injure him any further by raising the tank up. By that time they had the hitch made and we lifted the tank off him and took him out. The crane I had there was a powerful piece of machinery; it would

pick up an engine or tender. After he was removed I proceeded to clear the wreck. I observed the position Mr. Kinney's
755 engine was in. The engine lay directly on its side, and the front end of the engine blocked the westbound main track of the Falls branch and the westbound leg of the 'Y.' It laid in a way on the inside rail of the 'Y' track, that is, towards the Falls Branch. No part of that engine was upon the wires connected with the signals; it wasn't over that far.

No part of it was on this dwarf signal. It was in between the dwarf and the westbound track. In clearing it up a hat and some clothes were picked up."

(Mr. Flynn read the cross examination as follows):

"Cross-examination.

By Mr. Ward:

I made no examination of the wires and signals there, that wasn't any part of my business. All I did was to pick this engine up and get it off of Kinney and clear the track. I had Mr. Kinney out after I got there in probably five or ten minutes.

This dwarf that we have been talking about here was not any great distance from where the engine was lying. The west end of the engine blocked the westbound Falls Branch, which would leave the entire engine and tender between the point of intersection and the dwarf. The engine and tender is nearly 80 feet long, I believe.

Q. What the condition those were and so on were in when you got there you don't know anything about?

756 A. No, I didn't examine them at all."

(Mr. Spratt read the redirect examination as follows):

"Redirect examination.

By Mr. Rourke:

I did observe that no part of this wreck had gone over to the wires. The engine wasn't on that side of the track at all, in fact we put it over there ourselves to clear the westbound Falls track."

(Mr. Flynn read the recross examination as follows):

"Recross-examination.

By Mr. Ward:

We raised it up and swung it around, to clear the west bound Falls track. We just shoved it out to the side, out towards the wires. We pulled it back up this side I should say ten feet and then raised it on a balance. The engine proceeded on this track; when she tipped over she tipped over on this track, and the front end blocked this Falls Branch westbound; we pulled it back here (indicating on map). I know the front end blocked this westbound Falls main

line track. We pulled it back and moved it over to the side so that we could clear that track. We did not clear the tracks on the 'Y.'"

Mr. Spratt: I will read the testimony of John H. McCarthy, page 815, which was read before.

757 (Mr. Spratt read the direct examination as follows):

"JOHN H. MCCARTHY, sworn for the defendant, testified as follows:

Direct examination.

By Mr. Rourke:

I am chief clerk of the motive power department of the New York Central at Depew, and had charge of the records out there at Depew, at the time and prior to this accident to Mr. Kinney. At your request before the first trial I made a search for such work reports as I had on engine 2499 for October, 1908. I turned over to you such reports as I had and as I could find on that engine for that period; three in number, that I saw at the previous trials and which you show me now. The records of master mechanics or the engine house as a rule were forwarded to our office and there filed. That was our custom and practice. Our office was burned after the first trial and before the second. I think it was the night of the 25th of April, 1910. The office building was destroyed, including such records as we had there. After re-building it was destroyed again before we got in it the second time. Those are the only reports that we could find there in the files of engine 2499 for the month of October."

758 (Mr. Flynn read cross examination as follows):

"Cross-examination.

By Mr. Ward:

The time that I made a search for the record was before the first fire. They are supposed to have out there complete records of the various engines that operate in this part of the country. The engineers are instructed to turn in a report on each day. Those reports are to be held at the roundhouse for a time and then sent to the master mechanic's office. If the ordinary routine was complied with there should have been there in our files reports on that engine for every day in September and every day in October up to the time of the accident.

Q. What became of those reports or how they were missing from the file or who took them out of the files, if they were taken out, you do not know?

A. I couldn't say. That is all we could find."

(Mr. Spratt read the re-direct examination as follows):

"Redirect examination.

By Mr. Rourke:

The instructions are that where reports after they are through with them at the master mechanic's office they are sent to us for filing and such as were sent to us were filed."

759 (Mr. Flynn read the re-cross examination as follows):

"Recross-examination.

By Mr. Ward:

Those are not kept locked up exactly. I have the key to the room, but sometimes other clerks go in there to get other matter. That is the same room. The master mechanic has access to it, if he should have come there. I have never seen him there. The key is kept by me."

Mr. Spratt: I will read the testimony of A. G. HAWN, page 817.
Mr. Ward: Do you want his whole testimony?
Mr. Spratt: No. Just that part that he reads.

(Mr. Spratt reads testimony referred to as follows):

"These switches there are known as switch points, or split switches. Moving from the frog towards the switch point is called by raidroad men 'Trailing the switch.' If the switch was set for the main track and a car came on from the eastbound 'Y' track and struck the switch before stopping, it would so act that the car wouldn't be derailed. (With a trailing switch it could go through the switch wouldn't derail it). That is what they call 'going through the switch.' That has been my observation. It will not damage the points necessarily. It might break the points somewhat, but it wouldn't derail a train of cars."

760 Mr. Spratt: I will read the testimony of John M. Mansfield, page 841, read before.

(Mr. Spratt read Direct Examination as follows):

"JOHN N. MANSFIELD, sworn on behalf of *N. Mansfield* as follows:

Direct examination.

By Mr. Rourke:

I am a locomotive engineer, and was in the vicinity of this accident at Tower 55 on the night of October 12th, 1908. I was working on engine 160 in the yard pulling down from Austin street on track No. 2 in the yard. We were just about halfway between Tower 'I' Tower and 'H' at the time of the accident, on yard track

No. 2. The yard track takes the same general course as the Belt Line tracks. I pulled in on one of those tracks, about 7:35 p. m. I was in there before the actual collision. We pulled in up near Amherst street, pulled down through the yard to about here, and cut off down along in here around here, in here (indicating). We cut off and were looking for orders and one man says there was going to be a collision, and we were looking right across when they came together. I saw those two trains approaching a common point—the Michigan Central and Mr. Kinney's engine. My engine at that time was standing perfectly still. The Michigan Central when I first observed it was just across Hertel avenue. Kinney's engine was somewhere along in here (indicating on map). Between
761 Hertel avenue and the dwarf I could see the Michigan Central train distinctly. It was a passenger train. It was lighted; had nine or ten cars, I wouldn't be sure which. I could see the engine and caboose as it moved on the "Y" track. We heard the crash and saw the fire fly when the two engines came together. I left the engine in charge of the fireman and the conductor and I ran across to the wreck. It was my engine that later drew away from the fire the train of Michigan Central No. 3. I saw Mr. Kinney under the engine. We made a pillow for his back, as we couldn't get him out from the wreck, as the draw bar held the whole engine down so that we couldn't raise him up, and we made a pillow for his back to allow him to rest easy until we could get him out. The fireman took the engine and came up behind No. 3 and then I got on the engine. My engine was moved from where I left it. It came up this way (indicating), behind No. 3. I got on the engine, and we pulled the train back from the fire, so that it wouldn't catch afire. The caboose was west of those engines, both of them. It was burning on the eastbound track. When I pulled this train away, we went around with the engine behind Mr. Kinney's engine, thought maybe we could get at her and get him out, and we couldn't do it, we dare not try it because his feet were under there, and we didn't actually try it. That is, I mean after the Michigan Central train was pulled back, I went down by making
a movement around the "Y" behind Mr. Kinney's engine,
762 for the purpose of seeing if I could relieve him. Then we went back and coupled onto Michigan Central three and took her up in the yard. It was a clear night."

(Mr. Flynn read the cross examination as follows:)

"Cross-examination.

By Mr. Ward:

When I saw these trains come together and I saw No. 3 at Hertel avenue, at that time Mr. Kinney's engine was pretty close to the dwarf, right along in here (indicating); I couldn't remember whether closer to Hertel avenue or closer to the dwarf. Before my engine could get around here (indicating) they had to go to Tower

"I" and around on the main track from Tower I to Tower "H" and then down the main track to the wreck. It wouldn't take over ten minutes to go around there. Then they would have to run down to Tower "I" and then around to Tower "H". Mr. Bronson, one of the brakemen and also acting conductor and yardmaster, was with the engine when I left it. The fireman was left in charge of her. I got right on her as quick as she came up there. Then I came back to Tower "H" around to Tower "I", and went up on the same track that Mr. Kinney had gone up, and up by the same dwarf that he had gone by."

763 (Mr. Spratt read the re-direct examination as follows):

"Redirect examination.

By Mr. Rourke:

When I took No. 3 up in the yard I left the first car next to the engine, buffet car, near the wreck. Its front trucks were off the track, and we couldn't get them on. I have never been sworn in this case before. I remember the occurrence of that night. And I disclosed them upon the investigation as to which engine pulled this train back."

Mr. Spratt: I will read the testimony of Patrick A. Clifford, fireman on his engine.

(Mr. Spratt read the direct examination as follows):

"Patrick A. Clifford, sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Rourke:

I am employed by the New York Central as fireman. I was firing for the New York Central in 1908, on the night of this accident for John Mansfield, the engineer that was sworn here. I
764 remember the occasion of this accident. Our engine at the time was upon No. 2 track in the yard between Tower "I" and Tower "H." I saw No. 3 coming down the main track and I saw Mr. Kinney's engine over on the "Y," and I saw them both hit and heard the collision.

Q. Where were they relatively speaking to each other?

A. When I seen them first Kinney was up on the "Y" with his engine and No. 3 was between Tower "H"—it was around Hertel avenue. No. 3 was lighted. I seen them stop and heard the crash. I did not observe anything of the signals that were displayed. The engineer left me in charge of the engine, and he with the conductor went across to see if they could render any assistance. Bronson the brakeman, was left with me on the engine. After Mansfield and the conductor left we pulled down to the dwarf, leading out of No. 2 in

the yard and proceeded to Tower "I." Bronson went to the tower and I stayed on the engine. When he returned from the tower he says 'We will cross over and go up to the yard office and get the yardmaster.' We went up to Tower "H" and met the yardmaster. I didn't know the conductor. From there we went down to No. 3 and handled this train that has been described here."

(Mr. Ward read cross examination as follows):

765 "Cross-examination.

By Mr. Ward:

I went back around on the "Y" right up to this same dwarf that Mr. Kinney had passed a little while before. I was riding with Mr. Mansfield. He was on the right-hand side and I was on the left-hand side. This is the first time that I have been sworn. I didn't make any statement that night to Mr. McEwen.

Q. When you got down to Tower "H" the only person you know of getting on was the yardmaster?

A. That is all I seen. I didn't know the other man.

Q. Was there any other man that you noticed?

A. I didn't notice."

ANTHONY SCHWARTZ, was duly sworn as a witness in behalf of the defendant:

Direct examination.

By Mr. Spratt:

Q. Mr. Schwartz, you live in Buffalo?

A. Yes, sir.

Q. And you work for the New York Central?

A. No, sir.

Q. What is that?

A. No.

Q. Where are you working now?

766 A. No place.

Q. How long is it since you quit working for the New York Central?

A. About three weeks ago.

Q. You aren't working anywhere now, you say?

A. No.

Q. In 1908 were you working for the New York Central?

A. Yes, sir.

Q. In what capacity?

A. Machinist.

Q. Where were you working in October, 1908?

A. At the West Shore roundhouse.

Q. Do you remember this engine in question that Mr. Kinney was using at the time of the accident?

A. Yes, sir.

Q. Do you remember of his taking her out the day of the accident?
A. Yes, sir.
Q. Did you do any work on her that day?
A. Yes, sir.
Q. Just before he took her out?
A. Yes, sir.
Q. What work did you do on her?
A. I repacked the left piston rod.
Q. Was there anyone helping you?
A. Yes, sir.
Q. What was his name?
A. Otto Krieger.

Q. You say you packed the left piston rod? Tell us what
767 you did to that piston rod. By packing what is meant?

A. I took the packing out and looked at it, and it looked all right, so that I filed the ends up to make them closer to the rod, to fit them closer to the rod and put it in again.
Q. Was there any cut on the piston?
A. No, sir.
Q. Was there any indication on the packing that there was a cut on the piston?
A. No, sir, I didn't see any.
Q. If there had been would you have seen it?
A. Why, yes.
Q. What does a cut on the piston do to the packing?
A. Well, if there is a mark on the piston rod it shows the same mark on the packing.
Q. Does it cut the packing?
A. Yes, it cuts the packing.
Q. Did you fix that? Did you do a good job, workmanlike job on that packing?
A. I did a good job, yes, as good as I could.
Q. You say as good as you could. Was it a good job?
A. Yes, good job.
Q. After you finished your work did you state to Mr. Carroll or Mr. Ross that you weren't satisfied with the job, that you had done the best you could?
A. No, sir, I didn't see him.
Q. Did you see either one of those men at all?
A. No.

Q. Did you say anything to Mr. Kinney?
768 A. No, sir.

Q. You simply completed your job, and then where did you go?
A. When I finished the job I went back to my old job.

Mr. Spratt: That is all.

Cross-examination.

By Mr. Ward:

Q. Mr. Schwartz, now this has been quite a long time since you fixed up this packing, hasn't it?
A. Yes, sir.
Q. And I suppose when you fixed it up you didn't think there was going to be any lawsuit about it?
A. No, sir.
Q. I suppose it was pretty near a year after that before anybody asked you about what you had seen, wasn't it?
A. Yes, sir.
Q. But since that time you have been a witness 5 or 6 times, haven't you?
A. Yes, sir.
Q. You mean to tell the truth about it, don't you, Mr. Schwartz?
A. I always did.
Q. And you mean to now, don't you?
A. Yes, sir.
Q. You didn't see that piston rod, did you?
A. Yes, sir.
Q. What?
A. Why, yes, I see it.
Q. You have always told us that you didn't see it, haven't you, Mr. Schwartz?
769 A. Well, if I didn't see it I couldn't have packed it.
Q. Didn't you tell us that you didn't know whether the piston rod was cut or not?
A. I don't know if the piston rod was cut. If it was cut I would see it on the packing too.
Q. Do you know whether that piston rod was cut?
A. No, sir.
Q. You don't know, do you?
A. No, sir.
Q. And you didn't look it over to see, did you?
A. No, sir.
Q. Who was your boss?
A. Mr. Carroll was the boss.
Q. Who was over you? Who put you at this work?
A. Jim Ross.
Q. This man that was here?
A. Yes, sir.

Redirect examination.

By Mr. Spratt:

Q. You say in answer to the counsel's questions that you didn't see any cut on the piston rod?
A. No, sir.

Mr. Ward: He says he doesn't know whether there was one on it or not.

Q. What do you mean by saying that you don't know whether there was one or not?
A. If there was any cut on the piston rod it would have shown the same cut on the packing.
770 Q. It would have shown the same cut on the packing?
A. Yes, sir.
Q. Was there any cut on the packing?
A. No, sir.
Q. Could you see the whole piston rod when you took the packing off?
A. Well, I didn't see the whole of it.
Q. You could see that part of it where you took the packing off, could you?
A. Yes, sir.
Q. Was there any cut on that part of it that you could see?
A. No, sir.
Q. You mean to say you couldn't see the——

Mr. Ward: It seems to me the counsel ought not to be telling this witness in this way what to swear to. He does it with every witness, one after the other.

The Court: Leading, of course, is one of the most reprehensible of all our mistakes, and this is leading the witness.

Mr. Spratt: I have to differ with your Honor, with all due deference. I have to take issue on that point.

The Court: You have a right to object to anything I do, and take an exception to it, but I say that you are leading this witness.

Q. Did you see all of the piston rod?
A. Well, I see some of it, yes.
Q. Did you see all of it?
A. No, sir.
771 Q. If there had been a cut on the piston rod would that have shown on the packing?
A. Yes, sir.
Q. And did you see the packing?
A. Yes, sir.
Q. The counsel asked you if you would swear there wasn't a cut on the piston rod itself, and you answered no. What did you mean by that?
A. Well, I didn't see no cut on the piston.
Q. And you didn't see any cut on the packing?
A. No, sir.

Mr. Spratt: That is all.

Recross-examination.

By Mr. Ward:

Q. You put the same packing right back in, didn't you?
A. Yes, sir.
Q. Did you know that Mr. Dorgan had brought that engine in that morning, reporting that it was leaking steam so that it obscured signals?
A. No, sir, I didn't know anything about it.
Q. Did you do anything else to that engine except to take the packing out and shorten it up and put it back?
A. That is all I know.
Q. That is all you did?
A. Yes, sir.
Q. Did you fix the leak in the belly of the boiler?
A. No, sir.
Q. Did you fix the leak in the injectors?
A. No, sir.
Q. Do you remember when that engine was brought in by
772 Mr. Chares Kinne, another engineer, about three days before, reporting that it leaked steam from the same place so that it obscured signals?
A. I don't know anything about it.
Q. Is that the only time you fixed it?

Mr. Spratt: I object to it as incompetent, irrelevant and immaterial.

A. That is the only time I fixed it while Kinney was there and checking it off.
Q. Have you told us all that you did to it?
A. Yes.
Q. All you did was to take out the packing and shorten it up and put it back?
A. That is all I done.

By Mr. Spratt:

Q. Do you have anything to do with repairing the boilers?
A. No, sir.
Q. You are a machinist?
A. Yes, sir.
Q. And fixing packing is a part of a machinist's duty, is it?
A. Yes, sir.
Q. If there had been leaks in the boiler, or if there had been leaks where Mr. Ward describes, would you have had anything to do with that?
A. No, sir.
Q. Would that have come within your work?
A. Why, no.

By Mr. Ward:

Q. Did you see anybody else fixing it?
A. I didn't see nobody there while I was there.

773 Mr. Spratt: I would like to finish with the witness first.
Mr. Ward: I thought you had. Pardon me.
Mr. Spratt: No.

By Mr. Spratt:

Q. You say that the packing, you filed the ends off, did you?
A. Yes, sir.
Q. What effect did that have on the packing?
A. It closed up the packing closer to the rods so that it don't leak.
Q. Makes it tighter?
A. Makes it tighter on the rod.
Q. State whether packing that has been used, and in proper shape, is better than new packing, so far as keeping the steam in?
A. Well, old packing is wore down to the rod more than a new one would.
Q. Is that better?
A. Why, yes.
Q. And the packing that you fixed, was this packing in good shape?
A. Yes, sir.

Mr. Spratt: That is all.

By Mr. Ward:

Q. You didn't really need to do anything to it at all, did you, Mr. Schwartz?
A. I done so that I thought it was all right.

Mr. Ward: That is all.
Mr. Spratt: That is all.

(Recess until 2 o'clock p. m.)

774 Proceedings After Recess.

Otto Krieger was duly sworn as a witness on behalf of the defendant:

Direct examination.

By Mr. Spratt:

Q. Mr. Krieger, you work for the New York Central?
A. Yes, sir.
Q. What is your occupation?
A. At the present time, machinist.
Q. Did you work for the New York Central in 1908?

A. Yes, sir.
Q. What were you doing then?
A. I was helping Mr. Schwartz.
Q. As a machinist?
A. Helper.
Q. As a helper?
A. As helper at that time.
A. As a helper at that time.
Q. And how long had you been working out there at that time?
A. Two years.
Q. And you helped Mr. Schwartz on this occasion in repairing engines?
A. Yes, sir.
Q. Do you remember about repairing the Kinney engine the day of the accident?
A. Yes, sir.
Q. Did you help Mr. Schwartz in doing that work?
A. I did.
775 Q. What did you do to the engine?
A. We were sent out there by Mr. Ross to pack the left piston rod on 2499.
Q. What did you do to it?
A. Why, we took the stuffing box apart, took the packing out, and examined the packing, and we found that the packing—the packing consisted of three rings, and the rings were cut in half, and the two halves of the packing came together, the ends of it. Well, that means that the piston travels through the packing loose, and in order to make the packing tight, steam tight, we had to go to work and file the ends off the packing so as to hug the rod instead of the packing hugging itself.
Q. To hug the rod?
A. To hug the rod.
Q. In doing that work could you see the piston or some part of it?
A. You have got to see the piston. You are working right on the piston.
Q. Did you see any cut or cuts in that piston?
A. No, sir.
Q. If there were any cuts in that what effect would it have on the packing?
A. Why, it would indicate a scratch, or whatever cut there may be on the piston rod it would indicate on the packing.
Q. Was there any indication——
A. No, sir, there was not.
Q. On the packing of a cut?
A. No, sir.
Q. Did you repair it in good shape?
A. Yes, sir.
776 Q. Was that all that was necessary to do, in your opinion?

Mr. Ward: I object to that.

Q. Was there anything more to do, in your opinion, other than file the ends?

Mr. Ward: I object to that. Ask him if he did anything more. I object to this witness being the judge of that.

The Court: Has he the necessary qualifications?

Q. You had been there how many years doing that kind of work?

A. Two years.

Mr. Ward: He didn't examine the engine.

Mr. Spratt: I am just asking about the packing, and nothing more.

The Court: He may answer, and exception to the plaintiff.

A. We did all we could to repack that piston. That is all we done.

Q. Did you properly repack it?

A. Yes, sir.

Q. Did you have any talk with Mr.—what was the man over you there that you have spoken of?

A. The gang boss?

Q. Yes.

A. Mr. Ross.

Q. Did you have any talk with Mr. Ross or Mr. Carroll after the work was done?

A. No, sir, I did not.

Q. Did you tell Mr. Ross or Mr. Carroll, or either of them, that you had done the best you could to make the repairs on that
777 packing, but you weren't satisfied with the job?

A. No, sir.

Q. After you had made your repairs where did you go?

A. We went back to the engine we were working on before Mr. Ross sent us out.

Q. Did you have anything to do with repairing steam leaks or anything of that kind?

A. No, sir. There are different men to do that work.

Q. Did you notice whether there were any steam leaks in the belly of the boiler when you were working there?

A. I did not.

Q. Do you mean to say you didn't notice, or——

A. I didn't notice.

Mr. Spratt: You may examine.

Cross-examination.

By Mr. Ward:

Q. You have told us all that you did to this engine, have you, Mr. Krieger?

A. Repacked the piston rod.

Q. That is all you did to it?

A. Yes, sir.

Q. Did you do anything to it the day before?

A. No, sir.

Q. Or within the week?

A. I don't remember seeing her even.
Q. Do you know it was reported leaking steam so that it obscured signals the day before?
A. No, sir.
Q. Did you know it was reported the same way that morning?
A. No, sir.
778 Q. Did you know that three other engineers beside the two I have mentioned had reported it leaking steam since the first of October?
A. No, sir.
Q. And this is the only job that you recall that you gentlemen did on it that month?
A. That is all we had to do on it.

Mr. Ward: That is all.
Mr. Spratt: That is all. If your Honor please, Mr. Carroll, who testified here, was here at the beginning of the trial and after the adjournment he had to go to Philadelphia in the Government service, and the Government wouldn't let him come back here, so that by an agreement with Mr. Ward I read a part of his testimony taken on the previous trial, page 785.

Mr. Spratt read as follows:

"WILLIAM P. CARROLL, re-called in behalf of the defendant, testified as follows:

Direct examination.

By Mr. Hollister:

Q. Mr. Carroll, were you here when Mr. Ross made a statement here that he made a report that the machinists had done as good a job as they could on engine 2499, but that the piston was cut?
779 A. And during this trial?
Q. Yes.
A. No, sir, I wasn't here.
Q. Well, he so testified, that in substance. Did he ever make any such report to you on that day?
A. Not that I remember of, no, I have never any recollection of any such conversation.
Q. Did you have any conversation with Mr. Ross in the plaintiff's presence about that matter that I have called your attention to, about that statement?
A. No, not that I remember of.
Q. Either in his presence or out of his presence did you ever have any such conversation with him?
A. I never——
Q. Either in Kinney's presence or out of his presence did you have any such conversation that day with Mr. Ross?
A. I never to my recollection had a conversation with him on that matter.

Q. Did you ever have any conversation with Mr. Kinney himself that day about that engine?
A. I did not.

Mr. Hollister: That is all."

Mr. Ward read the cross examination as follows:

"Cross-examination.

By Mr. Ward:

Q. I understand it, you don't recall having any conversation with Mr. Ross?
A. No, sir.
Q. Well, you were there, Mr. Carroll, at the time Mr. Kin-
780 ney—at that date, the 12th of October, you were in charge of the business there?
A. I was.
Q. And do you recall any other conversation you had that day?
A. No.

Mr. Ward: That is all."

Mr. Spratt: Doctor Marcy is in another trial, so that I will read his testimony.

Mr. Spratt read as follows:

"WILLIAM H. MARCY, M. D., called in behalf of the defendant, and being duly sworn, testified as follows:

Direct examination.

By Mr. Hollister:

Q. Doctor, you are a practicing physician and surgeon?
A. Yes, sir.
Q. How long have you practiced surgery?
A. About 24 years.
Q. Did you attend Mr. Kinney?
A. Yes, sir; October, 1908.
Q. And took care of him how long?
A. Why, I should say two or three months. I don't know definitely. I took care of him at the hospital, and then after he went home.
Q. You were the surgeon then for the New York Central?
781 A. Yes.
Q. You never made any and have no charges to make against Mr. Kinney?
A. Not against Mr. Kinney, no, sir.
Q. Will you tell us what you did for him; what the nature of his injuries was?

A. He was brought into the hospital with a crushed right leg and a fractured left leg, and the right leg it was necessary to amputate it about nine inches, eight or nine inches below the knee, and the left leg, the bones were broken near the ankle, and that was put in the—the bones were put in position, and the leg put in a plaster cast.

Q. Have you examined him in the last two or three months?

A. The last time I examined him was March the 14th, 1917.

Q. Of this year. Yes. Will you tell what the condition of his leg is now, the stump?

A. The stump at that time had a—he had an 8 or 9 inch leverage, that is, from the knee down he had nine inches, that goes into an artificial socket, giving good leverage. He had a healthy end on the stump, and what we call a good stump for a leg, for an artificial leg. He had good knee action, flexion and extension.

Q. And what condition is the ankle of the other foot in?

A. The ankle of the other foot, he has extension a little better than a right angle, but the full extension and flexion is limited in the left ankle, so he gets a full bearing on the foot. In the
782 lateral motion, the rocking motion and rocking out, he has none of that motion.

Q. Did you notice the kind of she he was wearing, as to whether it has any extra thickness of the heel?

A. He has a shoe that has—I think he has an iron, hasn't he, as I recall? The shoe is built up on one side, and then he has an iron, I think a little crescent shaped iron on the heal.

Q. On the outside of the heel?

A. This is the left we are talking about.

Q. Yes. I mean in regard to whether with the shoe built properly is he able to put his foot flat on the ground?

A. He can put his foot flat on the ground, because he has extension at a little better than a right angle, so he can put his foot flat on the ground. In the bearing of the foot naturally there is a little more pressure on the outside of the foot than there is on the inside, but he has bearing on his foot in a natural position except there is a little more weight thrown—or the gravity of his body is thrown to the outside of his foot rather than to the inside of his foot.

Q. So it is not necessary simply for him to touch the ball of his foot?

A. He can bring his foot, he can bring his heel and toe down on the ground in stepping, or shoe.

Q. What did you find in reference to the sacroiliac joint, and what is that joint again, if you will tell us?

A. Well, in common terms, that is the haunch bone that joins these bones on the side that join the middle bone of the spine,
783 the sacrum (indicating) and that joint where the haunches join the base of the backbone is called the sacroiliac joint. I found no movable joint there. The shape of the muscles, the contour of the muscles, about his buttocks, is changed, because the muscles do not act as they did before his leg was taken off, so that they are used not at the same range and in the same way as they were before. It is making a change in the contour of those muscles,

and given a different appearance in the shape, muscular shape, about the sacroiliac, but I did not find any movable sacroiliac.

Q. Did you find any injury whatever to any nerve in that region?

A. Not to any nerve or joint, no.

Q. So that there is no injury to that joint in any way at the present time?

A. Not as I could find.

Mr. Hollister: I think that is all."

Mr. Flynn read the Cross-examination of Dr. Marcy as follows:

"Cross-examination.

By Mr. Ward:

Q. Did I understand you that this remaining foot, he walks on the outside of it to some extent, doctor?

A. When he strikes the bearing comes on the outside, but in a way he gets the full bearing forward and backward and laterally, but when he strikes on the outside—he has a tendency to
784 strike on the outside, because the foot would turn in so the gravity, the pressure, would come just back of the little toe, on the left foot.

Q. What bones were broken in the left foot?

A. Both ankles, both ankle bones. This ankle up here was broken off and this ankle up here a little higher (indicating). The ligaments were injured on the side, with a tendency for the foot to turn out, and to overcome that I set his foot and locked it so that it would come in, so that there would not be a turning of the ankle and a flat foot, so that the bearing comes on the outside, and the ankle is intended to, has a tendency to turn out that way, but it has a tendency to turn in, but when it strikes on the little toe, and he has a callous there, because he strikes that in walking.

Q. It was a pretty good job to save that foot at all, wasn't it, doctor?

A. No, I wouldn't say to save that; there wasn't any doubt about saving that foot.

Q. I mean to say that it would have any——

A. (Interrupting.) Action?

Q. Yes.

A. Well, I wouldn't say it was a good job. Of course locking his ankle, locking inside and out, it is a little handicap. It is better than if it was turning out, because he has to put extra weight on that, and that ankle would turn right out, and these arches would drop, so that he would not be able to get along at all.

Q. That was a choice of two evils; you had to lock it?

785 A. Yes, I would say that would be true.

Q. Either you had to do that or indicate it?

A. No, no, you had a foot to deal with, and it is better to let the joint be a little stiff than it is to have a wabble joint, so I locked it, to give him strength, rather than to give weakness.

Q. We are not complaining. We think the result is better than we could expect.

A. No, I am putting the question up to myself in dealing with it.

Q. Suppose a man has got a wooden leg, a wooden foot, does that throw an additional burden on the remaining foot?

A. Yes, sir.

Q. In use?

A. Yes, sir.

Q. Bound to, isn't it?

A. Bound to. That is why you need the strong ankle.

Q. So that this man's remaining foot, which, because of the other foot being gone, is subjected to an additional burden——

A. (Interrupting.) An additional burden, yes.

Q. (Continuing:) —is not as good a foot as an ordinary foot?

A. Well, no, but he can stand the burden possibly as well as far as weakness of the ankle is concerned, but of course it is not a normal action; it isn't as good as a normal ankle.

Q. Now, there was something that you knew about, I think better than Dr. Gardner. You testified that Mr. Kinney had some
786 trouble with his knee, in addition to the ankle, the foot being cut off, and the ankle trouble.

A. Not at the time of the injury, or afterwards. In moving his right knee and moving his left knee you would get a grating in there.

Q. A crepitation, is that what you call it?

A. Yes, sir, crepitation. False crepitation would be a proper term.

Q. And what has caused that?

A. Well, that I don't think is due to any injury, for the simple reason he had no synovitis or injury to the knee joints at the time, and a good many of us have creaking in the knees.

Q. Do you think that was due to the accident?

A. I think not, being on both sides, as I recall.

Q. Just refresh your recollection, doctor (referring to appeal book).

A. Well, I have refreshed my recollection on the examination I made in 1910, that I didn't have before, but I would be pleased to see that. (Mr. Ward hands appeal book to witness.) Well, that does not change what I have just said. I say now—what I say now is just what I say there.

Q. What do you say now about that crepitation?

A. Why, just as it says there. He has crepitation in both knees. It is a little more marked in one than the other, but at the same time when he was injured he had no injury to the knee joint and no synovitis to produce any crepitation, so that, that being true, the crepitation we know now was something he had before, and what lots of us have who have never had an injury.

787 Q. If he never had had this before it would be fair to assume it was due to the accident?

A. If he had never had it before. A man to have crepitation has got to have water in the joint, and he has got to show a synovitis and

he did not have it up to the end of the three months that I took care of him.

Q. Then this trouble with his back, doctor, which causes that position, that is not quite normal?

A. Not quite normal. The muscles are under more or less of a strain.

Q. Will you just describe that a little more fully?

A. Well, in walking he has to get his swing from his group of muscles that are attached to the hip as well as to get his swing from that (indicating). That makes these muscles all about here work differently than they used to work, so it has changed the shape of those muscles, so that in walking one side of the buttock as compared with the other is different, and those muscles are not used exactly as they were intended to be used when he had his leg.

Q. Well, what is there about that that causes pain, doctor?

A. I suppose that those muscles are, when he walks a good deal and on his feet a great deal, they are put on a strain, and it is like one of us standing in an unnatural position for any length of time, we have a pain, and want to rest our position and rest the muscles that are put in a strain.

Q. That is the indirect result of the accident?

788 A. That is the indirect result of the accident.

Q. And it having lasted all these years——

A. (Interrupting.) Oh, the strain is going to be there.

Q. (Continuing:) —that will never get any better, will it?

A. That will be just the same.

Q. And such a condition of such ankle and foot are in, that will never get any better?

A. He will not improve from what he is at the present time.

Q. At the time of this accident was Mr. Kinney suffering a good deal from shock, doctor?

A. Yes, sir.

Mr. Ward: That is all.

Mr. Hollister: That is all."

HERBERT L. BRONSON, was duly sworn as a witness in behalf of the defendant.

Direct examination.

By Mr. Spratt:

Q. Where do you live Mr. Bronson?

A. Jamestown, N. Y.

Q. By whom are you employed there?

A. The Art Metal Construction Company.

Q. Were you at one time in the employ of the New York Central?

A. Yes, sir.

Q. Covering what period?

A. I would say from the fall of 1901 to the spring of 1911.

789 Q. And during that time what kind of work were you doing?

A. Well, I started in—I believe my first work was a clerk at Erie street freight house, afterwards car checking, office work, switchman and yardmaster, yard conductor, almost any capacity that was in connection with the freight work in that portion of the city.

Q. Do you remember the accident to Mr. Kinney?

A. I do.

Q. What were you doing that night?

A. I was a yard brakeman.

Q. Where was your train located at the time of the accident?

A. The train that I was working on at that particular time was on what was known as the middle track.

Q. Where was that with reference to the "Y"?

A. That would be across on the Belt Line track, as I would call it, from the point of the "Y," and the Falls main track.

Q. You see that map there (indicating)? Have you ever seen it before?

A. I believe I have.

Q. Will you point out about where you were, or could you tell from that map?

A. In this what was known as the hole yard at that time

Q. Somewhere down here where the letters "N. Y. C." are (indicating)?

A. Somewhere down——

Q. From the N. Y. C. letters to the main track?

790 Mr. Ward: You will find he put a mark there the last time. He put "A."

Q. Do you remember where you put the mark there? There is "A" (indicating).

A. Somewhere about in there. I couldn't say exactly.

Q. Somewhere in there, about the letter "A"?

A. Yes, sir.

Q. As you stood there, Mr. Bronson, was your attention attracted to any engine and trains?

A. In reference to the accident?

Q. Yes.

A. My attention, of course, was called to No. 3 and Kinney's engine also.

Q. And about where were they when you first noticed them?

A. Why, it would be hard to recall. I would say that No. 3 was somewheres—if I may indicate on the map, somewheres in here between Tower H and Hertel avenue (indicating). Mr. Kinney's engine would be somewhere over Hertel avenue.

Q. Somewhere over near Hertel avenue?

A. Perhaps beyond. I wouldn't swear positively.

Q. Can you give us an idea about the relative rates of speed, or can you judge?

A. I couldn't give you an idea as to miles per hour. No, I wouldn't endeavor.

Q. Which engine was running the fastest?

A. Why, the passenger train.

Q. Did you notice any signals when you looked up there?

A. With reference to whom might I ask?

791 Q. With reference to either one. Take, for instance, the Michigan Central.

A. With reference to the Michigan Central, yes, I would swear that I saw that they had a clear signal.

Q. What do you mean by a clear signal?

A. It would be a green light.

Q. Where was that green light located?

A. On a high arm semaphore somewheres between Hertel avenue and perhaps—will I indicate?

Q. Yes.

A. In here somewhere between—perhaps closer to the Tower 55 than Hertel avenue, down in, say, here (indicating), somewhere in there. I couldn't recall.

Q. You can't place the location definitely?

A. Not now.

Q. Was it known as the home signal for 55, Tower 55?

A. The home signal, yes, sir, covering the westbound main.

Q. And that, you say, was green?

A. Yes, sir.

Q. And that indicated what for the Michigan Central train?

A. A right of way.

Q. Could you see the dwarf signal, No. 6, from where you were?

A. No. 6, I couldn't recall it by number.

Q. That is, it was the dwarf signal between the two "Y" tracks up near Tower 55 that would govern Mr. Kinney's movements?

A. No, I wouldn't swear that I could.

792 Q. What happened?

A. Well, in what way?

Q. Did these trains continue to go on?

A. They did, to the point of coming together, yes, sir.

Q. And the collision happened, did it?

A. It did.

Q. Where did you go after the accident happened?

A. As I recall, I went with my engine to Tower "I," went around the "Y," up behind Kinney's engine. I believe that was the first move. From there, as I recall again, to use the same term, I went back to Tower "I," from there to Tower "H," down the westbound main behind the passenger train. That is, I as a switchman accompanying the engine.

Q. Was it your engine that drew back the Michigan Central passenger train?

A. Yes, sir.

Q. Now, you said you at times acted as yardmaster there in this yard?

A. I have, yes. I did at many times act in that capacity.

Q. Have you acted as yardmaster there in 1908?
A. To say specifically, I wouldn't, but all during that period I acted as an extra yardmaster. Why, yes, during the period of 1908 I should say that I did at times.
Q. And before this accident?
A. Oh, yes.
Q. Are you familiar with the track known as the fence track?
793 A. I am.
Q. And you were in that yard about how many years, running in and out, and also as yardmaster?
A. Taking clerical capacity and car checking, yard brakeman, conductor and such,—do you mean the entire career?
Q. Yes, the entire career?
A. I think I was with the Central something like ten years.
Q. Before the accident?
A. No, not before the accident, but my entire career there.
Q. That would be how many years before the accident?
A. Well, the fall of 1901 I went to work for the Central.
Q. You say you know the fence track?
A. Yes, sir.
Q. Prior to the time that this accident happened what class of cars were put on that track?
A. That would be awful hard to answer.
Q. I don't mean as to the kind of car, but get right down to the intrastate and interstate.
A. Meaning by that——
Q. What was that track used for in that respect? Was it used for one kind or both?
A. I guess it was used for most anything that it came handy for.
Q. During that period state whether or not it was used at times for intrastate?
Mr. Ward: What does he know about it?
A. I don't understand the term. I really don't.
794 Q. Interstate and intrastate? What I mean by intrastate is cars that were to be used within the State of New York?
A. It was used for any capacity.
Q. Did you at times see that it was used and know that it was used for intrastate?
A. Yes, sir, absolutely.
Q. At times was it used for interstate?
A. Yes, sir.
Q. At times was it used for both?
A. Why, mixed trains, certainly.

Mr. Spratt: That is all.

Cross-examination.

By Mr. Ward:

Q. Mr. Bronson, what is intrastate?
A. Well, as I understand it, intrastate, entirely within the state.

Q. If a car was started from a point in New York State and was destined for a point outside New York State, what would you regard that?

A. I would regard it as an interstate car.

Q. If a car had come from a point outside of New York State and was destined for a point inside New York State, what would you regard that?

A. Interstate.

Q. You were a brakeman at this time.

A. At the time of the accident, yes, sir.

Q. And your experience as a yardmaster was simply acting as temporary yardmaster?

A. No, sir.

Q. What particular yard were you ever yardmaster of for the New York Central?

A. Black Rock yard.

795 Q. There was a large amount of interchange business between the Michigan Central and the New York Central at that time, and at all times, was there not?

A. Yes, sir.

Q. That is, the Michigan Central brings a lot of cars every day across the bridge, and they are put on these tracks and taken away by the New York Central, aren't they?

A. Yes, sir.

Q. And that was one of the uses to which this fence track and the middle track were set aside for?

A. Not necessarily set aside for that, no, sir.

Q. That was one of the uses of those tracks?

A. Yes, sir, it was one of the uses.

Q. That was a daily matter too, wasn't it?

A. It is a matter of routine.

Q. A daily matter, going on all the time?

A. It perhaps would occur every day.

Q. Then there was a large amount of business, cars brought by the New York Central, which were to be taken by the Michigan Central over across that bridge, wasn't there?

A. Yes, sir.

Q. That is, movements both ways?

A. Both ways.

Q. And those cars brought by the New York Central to be taken across that bridge were also put on those tracks?

A. Would be, under certain circumstances, yes, sir.

Q. Under ordinary circumstances?

796 A. No, the regular current of traffic, it would not be a natural move to make unless you were forced to use it for that purpose?

Q. As a matter of fact, weren't those three tracks leased by the Michigan Central of the New York Central and maintained by the Michigan Central?

A. I don't know anything about it, no, sir.

Q. Were there any other tracks in that yard set aside for the interchange business?

A. Nothing, only a right of way over, as I recall—as I was told, a right of way over the eastbound.

Q. And these three tracks were the tracks that the cars coming across from Canada were ordinarily placed on that were to be taken by the New York Central, were they not?

A. I wouldn't say, not in every instance, no, sir.

Q. I said ordinarily.

A. It would be one of the tracks that would be used providing it was the yardmaster's best place to put them.

Q. Do you know what kind of cars were on those tracks that night?

A. No, sir.

Q. You were handling a train there yourself on the middle track?

A. That is, a helper on an engine, yes, sir.

Q. What kind of a train was that?

A. I believe that the train that I was handling was a train of empty—or I wouldn't say empties; a train of cars either
797 shoved in by the Grand Trunk or the Michigan Central in the westbound and yard, and we pulled them through the middle.

Q. That would mean a train had come from Canada, wouldn't it?

A. Well, that one, yes, would mean in that instance.

Q. Do you know what was on the fence track at that time?

A. I do not, no.

Q. Of course, every train movement has a record, hasn't it?

A. Yes, sir.

Q. And at the time of this accident the New York Central had a record of the cars that were to be taken off that track?

A. They would be car checkers' records, yes, sir.

Q. Now, getting back to your vision there across this space. This accident happened in 1908, didn't it?

A. Yes, sir.

Q. And you were first called on to give evidence by the New York Central four years later, weren't you?

A. I wouldn't say.

Q. Well, what do you think about it?

A. I have given evidence in the case in former trials. I wouldn't say how much later or——

Q. How many times have you given evidence?

A. That I wouldn't say.

Q. In this case?

A. My best recollection would be at three trials, or possibly four.

798 Q. Do you remember who the judge was that you first testified before? Was it Judge Pooley?

A. Yes, I was before Judge Pooley.

Q. That was the first time, wasn't it?

A. I wouldn't say that, no, sir.

Q. Is your recollection poor, Mr. Bronson?

A. No, sir, not at all bad.

Q. But you can't remember how many times you have been sworn in this case?

A. No, I wouldn't attempt to say.
Q. And you can't remember the year you were first sworn?
A. No, sir, I wouldn't attempt to say.
Q. But you knew when you looked across there you could see a clear signal.
A. I do.
Q. When you looked down toward that tower from the direction—you stood up here, didn't you (indicating)?
A. Yes, sir.
Q. How far do you say that you had to look across there? Is it a quarter of a mile?
A. Perhaps, yes.
Q. Perhaps a quarter of a mile?
A. Perhaps a quarter of a mile. Less, if either way. Do you mean to the point of the accident?
Q. From where you stood to the place where you saw this signal?
A. It wouldn't be a quarter of a mile.
Q. (Counsel measures on map.) 23 inches, 50 feet to the inch. That would be 1,150 feet. Have you got pretty good eyes?
799 A. Yes, sir.
Q. You didn't have anything to do with that train movement, did you?
A. No, sir.
Q. You had your own train to attend to?
A. Yes, sir.
Q. You were standing down there on the ground, weren't you?
A. Yes, sir.
Q. When you looked across there you weren't very far out of line with all the rest of these signals, were you?
A. No, sir, not so far out.
Q. Yet you could tell this particular one out of all of those?
A. Yes, sir.
Q. You knew just how it stood?
A. Yes, sir.
Q. And you were able to tell the New York Central about it four years after?
A. Yes, sir.
Q. That was the first time they ever asked you about it?
A. I don't know as it was.
Q. Did you tell them that night?
A. I don't know as I told them that night.
Q. They went down to Jamestown and found you and brought you up here for a trial four years afterwards?
A. I don't know that I was living in Jamestown at the time I was first called here.
Q. Well, let me ask you a little about it. Page 412, third trial. I call your attention to the testimony on the trial given be-
800 fore Judge Pooley, Mr. Bronson, which was held in 1912. Did you testify there that you had resided in Jamestown, N. Y., for about two years?
A. This was in 1912?

Q. Yes.
A. About two years.
Q. Did you there testify, "I have resided in Jamestown, N. Y. about two years", the first question they asked you?
A. I think so. I would naturally say so if it is there.
Q. Well, is that true? Is that true, Mr. Bronson, that you lived down in Jamestown then?
A. I did, yes.
Q. How did they come to find out four years afterwards that you looked across there and happened to see that signal?
A. I don't know.
Q. Who came down and found you?
A. I believe it was one of the deputy sheriffs that found me. He handed me a summons.
Q. Somebody found you before that?
A. Do you mean somebody came to see me or interview me?
Q. Somebody from the New York Central?
A. Never.
Q. Do you mean they had put you on the stand here without knowing what you were going to say, or having a statement from you, or anything?
A. I think it was a local man that subpœnaed me.
Q. Nobody had interviewed you before?
801 A. No, sir.
Q. You had never told anybody that you saw this thing?
A. Why, certainly, I told a great many people.
Q. Who did you tell?
A. People that I was working with.
Q. People down in Jamestown?
A. I don't know as it was down in Jamestown.
Q. Did you hear about the Kinney trial?
A. I knew of it.
Q. Why weren't you up here the first three trials?
A. I don't know.
Q. But four years afterwards you came in here and gave this testimony?
A. I was subpœnaed to come here, and I came.
Q. Your eyesight remained just as good all the rest of the time as it was at that time, didn't it, Mr. Bronson?
A. Why, yes.
Q. You had seen Mr. Kinney's engine come on up here against the current of traffic and collide with this Michigan Central train?
A. I had, yes, sir.
Q. And then this engine with Engineer Mansfield and Fireman Clifford, whose testimony Mr. Spratt read, proceeded up over the same route that Mr. Kinney had gone against the current of traffic, didn't it?
A. I would not swear.
Q. What?
802 A. I wouldn't swear?
Q. Didn't you go on up that track, up back of Kinney's engine?

A. We went from Tower "I" to Tower 55, but which track we took I wouldn't swear.

Q. You came up toward that dwarf, didn't you?

A. Certainly, we had to be beyond the point of the dwarf in order to get close up to Kinney's engine.

Q. You went up there with the idea of seeing whether you could pull him back, or something, as Mr. Mansfield testified?

A. That was the dea.

Q. How was the dwarf?

A. I couldn't say.

Q. Didn't you look?

A. No, sir, I wouldn't swear that I looked.

Q. Did Mansfield look?

A. I don't know.

Q. Did Clifford look?

A. I don't know.

Q. But you three men went up there to it, didn't you?

A. Yes, sir, we went up there to it.

Q. And you knew that was the signal that Kinney had just run by, didn't you?

A. Why, I know, yes.

Q. You knew he had just run by it?

A. I know it is the signal he went by, yes.

Q. You took pains when you were down here (indicating), before you knew there was going to be any collision you took pains to notice how that signal that No. 2 showed so that you could swear to it four years afterwards?

803 A. Yes, I can swear to it now.

Q. But after you knew there was a collision you didn't take pains to see dwarf 6, did you?

A. I couldn't say that I did, no, sir.

Q. If it had been green would you swear to it?

A. No, sir, I wouldn't. I wouldn't swear to it because I had no occasion, as I recall, of knowing what it was.

Q. Are you still residing in Jamestown?

A. Yes.

Mr. Spratt: I will read the testimony of Mr. Frederick Livingston.

"FREDERICK LIVINGSTON, called in behalf of the defendant, and being duly sworn, testified as follows:

Direct examination.

By Mr. Hollister:

Q. Mr. Livingston, what is your present employment?

A. Treasurer of the Wheat's Ice Cream Company.

Q. In this city?

A. Yes, sir.

Q. Were you at one time in the employ of the New York Central?

A. Yes, sir.

Q. And in what department?
A. Transportation department, having charge of pay rolls of engineers and firemen and shop employees for the western division.
804 Q. Did you have charge of the pay rolls on which Engineer Kinney received his wages?
A. Yes, sir.
Q. Are these the original receipts which bear your signature (showing papers to witness)?
A. Yes, sir.
Q. This is your signature as timekeeper?
A. Yes, sir.
Q. Did you at my request from those original receipts figure the average monthly pay that Mr. Kinney received during the year 1907?
A. Yes, sir.
Q. The last complete prior to the accident?
A. Yes.
Q. What was the average monthly pay? (Showing paper to witness.)
A. $140.70.
Q. And what was the average monthly pay for the year 1903? (Showing paper to witness.)
A. $144.87.
Q. What was the average monthly pay for 1905? (Showing paper to witness.)
A. $135.54.
Q. And 1904? (Showing paper to witness.)
A. $128.25.
Q. For those four years as engineer what was the total average monthly pay?
A. $137.34.
Q. Did you ever take the first three months of 1908?
A. Yes, sir.
Q. That shows the actual earning?
805 A. Yes, sir.
Q. What did he earn during the month of January, 1908?
A. $153.58.
Q. And February?
A. February, 1908, $87.01.
Q. And March?
A. $85.07.

Mr. Hollister: I think that is all."

Mr. Flynn read the Cross Examination as follows:

"Cross-examination.

By Mr. Ward:

Q. Have you got the rest of the earnings for 1908?
A. I wasn't then in the employ of the New York Central.

Mr. Hollister: I have them here. I could not prove them by this witness, but I will read them, if you will not object.

Mr. Ward: Let me see.

(Mr. Hollister shows paper to Mr. Ward.)

Q. Were there more than one pay roll made up at different stations? That is, a man would be paid for part of his time in Buffalo and part in Rochester and part in Syracuse?

A. Not up to the time I left, which was March 31st, 1908. I believe after that then each—in other words the western division had been put into three divisions, with three division superintend-
806 ents, in January, 1907, and up to, I believe, the first day of April, 1908, the pay roll for engineers and firemen regardless of the division on which he worked was compiled and computed in Syracuse. After I left in April, 1908, each division took care of the earnings of their respective engineers and firemen while working on that division, I believe. In order to get a man's total earnings you would have to get the rolls for the three divisions after that time.

Q. Did you keep these things yourself, Mr. Livingston?

A. During a period which I have testified to, yes, sir.

Q. They are not in your handwriting, are they?

A. Can I look at that just a moment?

Q. Certainly.

A. I think they are.

(Mr. Ward shows papers to witness, who examines same.)

A. Yes, those are my figures.

Q. They are your figures?

A. Yes, sir.

Q. And in accordance with the system that you then had that would include all of Mr. Kinney's pay for that time?

A. Yes, during that period, yes, as an engineer.

Q. Well, supposing he worked sometimes as a fireman?

A. It would be included and embodied in one roll, in one account.

Q. And carry out the same total?

A. Yes, sir, and the roll showing the firemen's time, or engineer's time.

807 Mr. Ward: That is all.

Mr. Hollister: That is all, Mr. Livingston."

JOHN T. ALLEN, was duly sworn as a witness on behalf of the defendant.

Direct examination.

By Mr. Spratt:

Q. Where do you live Mr. Allen?

A. Niagara Falls, N. Y.

Q. What is your occupation?

A. At the present time, clerical capacity.
Q. At Niagara Falls?
A. No, sir, in Buffalo.
Q. How long have you been in the employ of the New York Central, Mr. Allen?
A. I was employed in 1896, and resigned in 1913, I guess it was. Re-employed in 1917.
Q. In October, 1908, what were you doing?
A. I had charge of the operation of the signal department.
Q. Do you remember the accident to Mr. Kinney?
A. Yes, sir.
Q. What notice did you first receive of it?
A. A telephone.
Q. Where did you live at that time?
A. Corner of Arkansas and Herkimer streets, Buffalo.
Q. About what hour was it you got the notice of the accident?
808 A. Why, I think about 9 or a quarter after 9. Somewhere about there.
Q. About how long did it take you to get to the scene of the accident?
A. Oh, 15, 20, 25 minutes. Something like that. I took a Grant street car up.
Q. When you got there tell me the position of the engines.
A. The Michigan Central engine was laying on its side on the east-bound Falls branch track, and Mr. Kinney's engine was laying on its side on the west-bound "Y" track.
Q. Had the wrecking crew got there at that time?
A. No, sir.
Q. Did you examine the signals when you got there?
A. I did, yes, sir.
Q. Which was the first signal that you came to?
A. The dwarf signal.
Q. What condition did you find the dwarf signal in?
A. It was at stop, danger.
Q. What was the color of that light?
A. Purple.
Q. Did you examine it?
A. Yes, sir.
Q. What condition did you find it in?
A. It seemed to be all right, as far as I could see.
Q. Did you notice any catching of the wires, or anything of that kind, or anything to indicate that?
809 A. No, sir, there was nothing that I could see.
Q. Did you notice the blade of the arm?
A. Yes, sir.
Q. What position was the blade in?
A. Horizontal, stop.
Q. What was the condition of the bracket, the lamp?
A. Why, it was all right as far as—I examined it very thoroughly. I didn't see anything wrong with it.

Q. What kind of an examination did you make of it?

A. Well, I shook it. I got ahold of it with both hands and I shook it, and I put my hand down between the casting and the glass of the lamp to see that there was lots of clearance, so that there would be no chance of the casting catching on the glass of the lamp.

Q. What condition did you find it in?

A. There was plenty of clearance.

Q. State whether or not it was in working order.

A. Yes, sir, working order all right.

Q. State whether from the examination you made of it it was possible to have any sticking or catching?

A. There was nothing so far as the lamp was concerned, the signal in itself, the casting or the lamp.

Q. The engine, Mr. Kinney's engine, did that lay on any of the wires in connection with the lamp, used between the lamp and the Tower 55?

A. The coal from the tank of Mr. Kinney's engine covered the wires, part of them.

810 Q. Did you make any examination with reference to that?

A. No, sir, no.

Q. You didn't dig underneath the coal?

A. No.

Q. There are two wires, are there, from the lamp to the tower?

A. Yes, sir.

Q. That form a sort of an endless——

A. Yes.

Q. State whether or not both wires were buried in the coal?

A. Yes, sir.

Q. Was there any part of Kinney's engine on the wires?

A. I don't think so. Still I wouldn't say positively, but I don't think so.

Q. After you had made this examination that you have described where did you go?

A. I went up to the switch.

Q. And what did you find with reference to the switch, in what condition?

A. The points had been bent.

Q. The points of the switch?

A. Yes, sir.

Q. That switch leading from the "Y" onto which track?

A. Onto the west-bound Falls track. I should say the east-bound Falls track.

Q. What kind of a switch was that?

A. An ordinary switch, needle point it was sometimes called by railroad men.

Q. Needle point?

A. Yes, the regulation switch.

811 Q. In what condition did you find the points of that switch?

A. Open slightly.

Q. Did I understand you to say that they were bent some?

A. Well, sprung, bent or sprung.
Q. About how much were they bent or sprung?
A. Why, between a quarter and half an inch.
Q. What did that indicate to you?
A. That something had passed through it, run through it.
Q. It has been testified here that the caboose which Mr. Kinney was pushing along went out and on the main eastbound track. State whether that could have been done without the switch being set for the east bound track?
A. Yes, sir, it is often done.
Q. Is it often done?
A. Yes, sir, quite often.
Q. How can it be done?
A. Why, the wheels of the car will force the points open sufficiently to pass through, sometimes bend the points, sometimes bend the rods, the connecting rods, sometimes break the points.
Q. In this instance, in your opinion, how did this caboose get out on this eastbound track?

Mr. Ward: I object to that. It is not proper for an expression of opinion. I think the gentleman can describe what he found there. I think that is as far as he can go.

The Court: You are swearing him as an expert?

812 Mr. Sprott: As an expert.

Mr. Ward: He might not know anything about the kind of signals that were being given, might not know anything about the conduct of the towerman. He is expressing an opinion now on the merits of the lawsuit.

The Court: I suppose it would have to be put in the form of a hypothetical question.

Mr. Ward: Mr. Sprott has already proved by this witness that cars can run through the switch points, and what happens to the switch points when they do do that? It seems to me that is all he is entitled to from this witness, not to have this witness express an opinion as to what caused this accident, which involves conditions into which Mr. Allen can't possibly know about, except by hearsay.

Mr. Sprott: I will withdraw that question, and put it in the form of a hypothetical question. This is an experienced railroad man, if I understand it.

Q. When you went there how was the switch set?
A. For the eastbound Falls track.
Q. What did you find on the westbound main track that carries the tracks of the "Y"?
A. There was just an ordinary rigid frog there. No switch.
Q. What is it, a sort of cast iron or cast steel?
A. Why, I presume it is steel. They are supposed to be steel at least. Just what is known as a rigid frog. That is, they
813 don't move. There is nothing movable about them.
Q. How is it fixed, so that the wheels, the flanges of the car——
A. The rails are grooved so that the flange of the car will pass through.

Q. Pass through in both ways?

A. Yes, sir.

Q. That is a solid cut for the main tracks and a solid groove also for the "Y"?

A. Yes, sir.

Q. Would a car passing over the westbound track, a caboose passing over the westbound track, would that meet with any obstruction so far as the frog is concerned if it was going out on the eastbound track?

A. Oh, no. It is just the same as a street car track, a street car crossing over one track. They are all the same. It is what they call a rigid frog with grooves in.

Q. Pass both ways without changing it in any way? When you got there you saw the switch points were set for the main tracks?

A. Yes, sir.

Q. How would the points lie as to the "Y" track?

A. They would be closed against the "Y" track. The switch was locked for the eastbound Falls track.

Q. How is it kept in place?

A. Locked.

Q. How is it locked, from where?

A. There is a plunger bar goes through a casting, and as
814 the towerman operates his lever in the tower, if he wants to move that switch he pulls his lock lever, and it withdraws that rod and allows the switch points to move in the opposite direction, and this hole slides out of place and another one goes in. It is a double hole concern. There is two holes in it. One locks it in the normal position and the other in the reverse position.

Q. The normal position is when it was set up for the main track?

A. Straight track, yes, sir.

Q. And the reverse position would be when it was set up for the siding?

A. Yes, sir, for the "Y".

Q. How are these switch points fastened together?

A. By rods, connecting rods.

Q. Does that hold them apart?

A. Yes, sir, it holds them rigid.

Q. Is it to the connecting rod that the pipes are fastened leading up to the tower?

A. No, they are connected to the slide rails.

Q. And so when they move the lever at the tower then that applies the force to the pipes, does it, or the chain?

A. Yes, sir, pipe.

Q. And then the pipe applies to the——

A. To the switch points.

Q. To what?

A. To the switch point.

Q. And pulls it or pushes it, just as the towerman desires?

A. Yes, sir.

815 Q. Now, you say you found it set normal for the main track?

A. Yes, sir.

Q. Now, assuming it was in that condition just prior to the accident, and assuming that a caboose fastened to the front end of an engine progressing northward on the "Y" track collides with an engine progressing north on the main track, these two engines collide and tip over, and the caboose breaks loose and goes forward across the westbound track, gets on the eastbound track, and goes down some distance on the eastbound track before it collides with a New York Central train coming in the other direction, and assuming that the switch points were bent about a quarter of an inch, it appears, after the accident, how would you say that caboose got out on the eastbound track?

A. Why, it indicated to me that it had run through the switch points.

Q. What indicated to you that it had?

A. On account of the points being open, bent.

Q. Assuming also the facts which I have just stated, and in addition to that when it collided with a New York Central eastbound train the eastbound train pushed it ahead and the train itself, or the engine, passed beyond and south of those switch points to the point where the Michigan Central engine lay, as you saw it, and assuming that there is no movement of the levers in the tower in the meantime, what would you say the condition of those switch points were at and before the time the caboose went out on the eastbound tracks?

816 A. Why, everything indicated they were set for the main track.

Q. If it hadn't been set for the main track what would have happened when the New York Central engine came back pushing the caboose?

A. It would have turned down around the "Y."

Q. It would have diverted the New York Central train down on the "Y"?

A. Yes, sir.

Q. Did the bending of the switch points a quarter of an inch, as you have testified to, would that affect the running of the train coming down the main line?

A. No, sir, we are allowed a quarter of an inch play at that time.

Q. So that the switch points could remain bent as they were and still wouldn't affect the travel down the main line?

A. Oh, yes.

Q. Wouldn't divert it?

A. Wouldn't affect it.

Q. If the switch points had been set for the "Y", so as to take the caboose out on the main tracks, would there have been any bending of the switch points in that movement?

A. No, sir, not under those circumstances. The points would be open.

Q. If they had been open would the New York Central train have been diverted onto the "Y"?

A. Yes, sir, the eastbound, yes, sir.
Q. Now, you take the switch point itself there, Mr. Allen. State whether or not it is thin.
A. Yes, comes right to a very thin wafer, right to a sharp point.
817 Q. Is that what is called the needle switch?
A. Yes, sir.
Q. Will that point itself bend some and deflect some by pressure?
A. Oh, naturally, yes, sir.
Q. Without breaking?
A. Yes, sir.

Mr. Spratt: You may examine.

Cross-examination.

By Mr. Ward:

Q. What was your job at this time?
A. Chief signalman was my title, in charge of the operations.
Q. Signal supervisor, were you?
A. No, sir, that is a different position.
Q. You were the chief signalman?
A. Yes, sir.
Q. This territory was under your jurisdiction?
A. Yes, sir.
Q. And you worked for the New York Central up to what time in that capacity?
A. I think it was in 1910 when they abolished the position. I think it was in 1910.
Q. And you left their employment?
A. No, sir, I left in 1913.
Q. There was a trial of this action in 1909, one in 1910, and one in 1912? Were you in their employ at that time?
A. Yes, sir.
Q. You weren't sworn by them on any of those trials?
A. No, sir.
818 Q. You had this same knowledge then that you have now, of course?
A. Yes, sir, I had.
Q. You knew just as much about it then as you do now?
A. Yes, sir.
Q. And the three trials, you understand, were questions relating to this accident the same as they are here?
A. Yes, sir, I was at the trials.
Q. You were there?
A. Yes, sir.
Q. They didn't swear you?
A. No, sir.
Q. And did you tell Mr. Spratt what you knew?
A. No, sir, not Mr. Spratt.
Q. Mr. Spratt was one of the firm of Hoyt & Spratt, wasn't he?

A. I believe so, yes, sir.
Q. This gentleman here (indicating) was one of the attorneys of record for the defendant at that time, wasn't he?
A. I believe so, yes, sir.
Q. And he has been the New York Central lawyer ever since this litigation has been in court, hasn't he?
A. So I understand.
Q. The first three trials were conducted by his assistants, Mr. Hugh Rourke and Mr. Thomas Powell?
A. Rourke is the man that I knew.
Q. Did you tell Rourke all this that you have told here?
819 A. Yes, sir.
Q. How you knew that that signal was at danger afterwards?
A. Yes, sir.
Q. You told him that?
A. Yes, sir.
Q. Did you tell it to him in writing?
A. No, sir.
Q. Verbal?
A. Verbal.
Q. He didn't swear you?
A. No, sir.
Q. And the first time you were sworn was nine years after the occurrence, wasn't it?
A. I guess it was about 1917. I don't just recall the year.
Q. That was after you had left the employ of the New York Central Railroad and then they had taken you back?
A. Yes, sir.
Q. And in a different position, and you are not now in the signal business?
A. No, sir.
Q. What is the nature of your position now?
A. Clerical position at the present time.
Q. What kind of clerical work do you do?
A. In the accountants' office.
Q. And during the time from 1913 when you left their employment, which was after the third trial, down to 1917, when you went back to work for them, what did you do?
A. I worked for the Toronto, Hamilton & Buffalo, at Hamilton, for about a year and a half.
Q. In the signal business?
820 A. No, sir. And from there I went to the Kansas City Belt as general yardmaster, Kansas City, Missouri.
Q. So that you continued in the railroad business?
A. Yes, sir.
Q. But not in the signal business?
A. Not in the signal business.
Q. When you were in that signal business it was part of your duty to go down and make an examination after a wreck, wasn't it?

A. Yes, sir, that was one of my duties.
Q. That is the reason they called you up?
A. Yes, sir.
Q. And they had a book that told all the different things that men in your department had to do?
A. Yes, sir.
Q. Entitled "Rules of the Signal Department governing construction and maintenance, in effect June 1, 1908." That was the book you were working under then, wasn't it?
A. That is the construction and maintenance work. We didn't have that. Ours was the operation.
Q. The operation?
A. Yes, sir. The signal supervisor had that work.
Q. Were you familiar with these rules in this book (indicating)?
A. Some of them.
Q. Were you familiar with this rule governing electricians, 92:
"In case of accident or wreck in which signal apparatus may
821 be in any way involved or affected, the electrician must go to the place as promptly as possible, note the situation and condition of the signal apparatus, and wire the signal supervisor brief particulars of the occurrence, and a list of the material required for repairs?"
A. Yes, sir.
Q. Were you familiar with the next rule, 93: "If the accident may have been caused, or is alleged to have been caused by defects in the signal apparatus, a thorough examination must be made immediately of all parts of the signal apparatus involved, and a written statement must be sent at once to the signal supervisor, giving full particulars of the conditions found"? Are you familiar with that rule?
A. Yes, sir.
Q. Do you know where the written report of this condition made by the man that had to comply with that rule at that time is?
A. No, sir, that wasn't my department. I didn't have——

Mr. Ward: I call for the production of that, under my notice to produce.
Mr. Spratt: What is it that you call for?
Mr. Ward: I call for the report of your electrician, made under Rule 93, as to what the condition of that electrical apparatus was at the time of the accident.
Mr. Spratt: We haven't got any such report.

Q. You don't know where it is, do you, Mr. Allen?
822 A. No, sir.
Q. Somebody had to make a report?
A. That would go to the signal supervisor, not to me.
Q. Somebody had to make a report then?
A. Supposed to.
Q. That had to be a true report?
A. Yes, sir.
Q. Did you ever see that report?

A. No, sir, I did not.
Q. That isn't the reason you weren't sworn on the first three trials, was it?
A. That wasn't mentioned.

Mr. Spratt: Where do you find that you asked us for such a report?
Mr. Ward: Mr. Flynn will look up the notice to produce.

Q. What was done with that report after it was made?
A. I couldn't tell you. I say that didn't come to me. I had nothing to do with that.
Q. Who would that go to?
A. The signal supervisor.
Q. What is his name?
A. At that time his name was Parker, John Parker.
Q. He was never produced on any of these trials, was he?
A. He has been here.
Q. Was he ever sworn?
A. Not while I was in the court room. I don't know whether he was other times or not.
Q. Do you know where he is now?
A. Yes, sir.
823 Q. Where is he now?
A. Rochester, the last I heard of him.
Q. Still working for the New York Central?
A. Yes, sir, as far as I know.
Q. There were men whose particular business it was to keep these things in repair, weren't there?
A. Oh, yes, sir.
Q. They had, in the first place, men that they called signal inspectors, didn't they?
A. Yes, sir.
Q. They went around and looked after those things?
A. Yes, sir.
Q. And they had to make reports if they found any part of the thing that didn't work?
A. Supposed to, yes, sir.
Q. Had blanks furnished them for that purpose?
A. I believe they had.
Q. Those reports come to you?
A. No, sir.
Q. Who would they go to?
A. Signal supervisor.
Q. Did you ever see any of those reports of defects in these alleged automatic signals?
A. I don't recall any, no, sir.
Q. Never saw one?
A. No, sir.
Q. Did you ever find in your investigations any of these signals defective?

Mr. Spratt: I object to it as incompetent, irrelevant and immaterial.

824 The Court: This is cross examination.

Mr. Spratt: At any time? If he confines it to this time in question——

The Court: He may answer.

Mr. Spratt: Exception.

Q. Did you ever find in your investigations any of these signals defective?

A. Defective?

Q. Yes.

A. No, sir.

Q. Never found one defective?

A. No, sir. Of course there has been more or less dispute.

Q. Did you ever find one that didn't work?

A. No, sir, I never have.

Q. Not a single signal in all your experience?

A. No, sir.

Q. Really?

A. Really. I never did.

Q. Did you ever get reports of dwarfs sticking at clear and at danger?

A. Those reports didn't come to me. I didn't get them.

Q. You have heard of them, haven't you?

A. I have, yes, sir.

Q. Then they had electricians, didn't they?

A. Yes, sir.

Q. They went around?

A. Yes, sir.

Q. And one of the things that the electricians had to do, in addition to those matters that I read you a moment ago, was to "frequently trace for defects, and if such are found they must repair or remove the defective parts and send the same to the

825 signal supervisor with a full report"? That is one of the things they had to do at that time?

A. Yes, sir.

Q. Who were the electricians that had this job?

A. Why, let me see. I think it was a man by the name of Doherty that was there at that time, although I am not clear. He wasn't in my department, and they used to change more or less. I think his name was Doherty at that time.

Q. The electrician in charge of that tower?

A. Yes, sir. I wouldn't be positive. I think his name was Doherty.

Q. Do you know where he is now?

A. No, sir, I do not.

Q. Then they had lamp men, didn't they?

A. Yes, sir.

Q. And those lamp men had to make a certain amount of examination to see that things were all right?

A. Yes, sir.

Q. Those lamp men, among the things they had to do was "To be particularly careful when placing the lamp on bracket or pole, to insure that the lamp is in proper position, and that the lamp or handle will not come in contact with and hold the signal longitudinally." That is one of the things the lamp men had to do?

A. Yes, sir.

Q. That was because if a lamp was not properly in position it might catch or hold the signal, and fix it so that it would not be movable?

A. Yes, sir.

826 Q. That is one of the things you had in mind, I suppose, when you went down there and looked at the thing?

A. It is, yes, sir.

Q. These dwarfs were so arranged that if the wires were cut, the wires were broken, what would the signal do if the wires were broken?

A. It should return to danger.

Q. If the wires are broken?

A. Yes, sir.

Q. Why is that?

A. The casting is heavy, a great deal heavier, of course, than the blade. It is only a short thin piece of iron, the blade is, and the casting that has the glass in is quite heavy, and of course gravity returns it to danger.

Q. Did you make any examination of these wires as they ran under the coal?

A. No, sir, not under the coal. No, sir.

Q. Do you know whether they were broken or not?

A. I do not.

Q. If they had been broken or loose, that signal if it had shown green before the accident would have gone to danger, wouldn't it?

A. It should have, yes, sir.

Q. When you got there you found it covered up with the coal and possibly with some of the engine?

A. Yes, sir, it might. I don't think there was any part of the engine though, but I am not quite clear on that. The coal was there, I know.

Q. These things run out of the tower, and run right along there in the open, don't they?

827 A. Yes, sir.

Q. And they run around four or five different pulleys before they get to the lantern from the tower?

A. That one made about three or four turns, yes, sir.

Q. And I suppose sometimes they slide off those pulleys, don't they?

A. Oh, yes.

Q. That is one of the common things you have to repair and look out for?

A. They have slid off. I have seen them yes, sir.

Q. Do you know whether any of these wires were broken or slid off that night?

A. There wasn't any that I could see. I examined that feature of it. There was none of the pulleys covered. That is, none of what we call the horizontal wheels. There was none of them covered with coal, and the wires were all right there, but what was under the coal of course I don't know.

Q. Who would be the man that went and made a complete investigation of that signal apparatus after they got the coal off, so that he could see what the situation was?

A. Mr. Parker, the signal supervisor. That was up to him.

Q. Would he do it personally or through subordinates?

A. Well, he should do it personally if he can get there.

Q. Do you know whether he did that there personally?

828 A. I think he did, yes, sir.

Q. He has never been sworn in any of these trials, has he?

A. Not that I know of.

Q. Did anybody ever give you any reason for not asking you these questions?

A. No, sir, they never said anything about it.

Q. For the first nine years which this investigation has been going on?

A. No.

Q. Was this tower different from any other tower?

A. Why, we had a great many of that same type of towers. Of course we had some others.

Q. Were the other towers reaching from this point down to Tonawanda and in Tonawanda similar to this tower?

A. Yes, sir.

Q. Put in about the same time?

Mr. Spratt: I object to it, unless the witness knows.

A. I don't know about that.

Q. Operated in about the same manner?

A. Yes, sir.

Q. Kept in repair the same way?

A. Yes, sir.

Mr. Spratt: I object to it, the witness not shown competent to answer.

The Court: If he knows he may answer.

Q. And under the same general officers?

A. Yes, sir.

Q. Under you?

A. Yes, sir.

829 Q. You understand the mechanism of that machine, don't you?

A. Yes, sir, I do.

Q. If anything was wrong with the connections to No. 6 that wouldn't prevent you using the other levers in the tower, would it?

A. If anything was wrong with the signal?

Q. With the signal No. 6, it wouldn't prevent you using your levers in the tower?

A. Will you just qualify that? Do you mean a broken wire or something like that?
Q. Yes.
A. No.
Q. Or a stuck light?
A. Well, if the light was stuck—the casting was stuck——
Q. I am not asking you about operating this lever. Mr. Reithenburg claims he didn't operate this lever. Would it interfere with the operation of the other levers?
A. No, sir, not if he didn't have to use that lever.

Mr. Ward: That is all.

Redirect examination.

By Mr. Spratt:

Q. But state whether or not if the switch were set for the main track, would that interfere then with the operation of the lever?
A. Yes, sir, it would lock it normal. Lock it to danger.
Q. How about the signals if they were set for the main track?
A. They would be locked also on account of the inability to operate the lever.
830 Q. So that in those two respects it would affect the "Y"?
A. Yes, sir, to that extent.
Q. You say you were at all these different trials, were you, Mr. Allen?
A. Yes, sir.
Q. I had nothing to do with any of the trials?
A. No, sir.
Q. You say you talked with Mr. Rourke?
A. Yes, sir.
Q. And you were in court here, were you, during the various trials?
A. Yes, sir.
Q. And at Mr. Rourke's request?
A. Yes, sir.
Q. It wasn't until Mr. Hollister tried the case the last time that you were called to the stand?
A. Yes, sir, I think that was the first time.
Q. You were ready here to go on the stand if the lawyer wanted you to?
A. I was, yes, sir.
Q. I suppose you don't recollect the particular condition of the towers elsewhere than this tower in October, 1908, do you?
A. The condition in regard to what?
Q. Oh, repair, or anything of that kind. You don't know what time the Tower "H" was put in, do you?
A. Oh, no, I couldn't tell you.
Q. Or Tower "I"?
A. No, they were in service when we came to work for the railroad.

Q. Or the tower at Tonawanda?
A. No, sir. No, I don't.
831 Q. Or the tower at North Tonawanda? You didn't know anything about those towers, or when they had been put in?
A. No, they were in service when I came to work for the New York Central.
Q. Or the physical condition they were in?
A. Well——
Q. Except a general——

Mr. Ward: Let him answer.

Answer. I had to make a general inspection every so often. Once a month, in fact, was the requirement. At least one a month.

Mr. Spratt: That is all.

Recross-examination.

By Mr. Ward:

Q. Just a moment, now that you have asked him about the Tonawanda towers. Were some of these towers in good condition and some of them in poor condition?
A. They were all in good condition, so far as I could see.
Q. Would the signals respond?
A Yes, sir.
Q. Always?
A. Always.
Q. Yet you had how many men to keep them in order?
A. Do you mean to keep them in order?
Q. Yes.
A. I don't know what the force of the maintainers' department was.
Q. How many times did you have reports made to you that signals didn't work?
832 A. I didn't have any.
Q. Or that came to your attention?
A. That went to the other department.
Q. That was a daily matter, wasn't it?
A. I couldn't tell you. They didn't come to me.

By Mr. Spratt:

Q. You didn't know when the apparatus was put in, or the age of it, in these different towers, did you?
A. No, sir, I did not.
Q. And the repair men were kept so that repairs would be made before any accident happened? Is that right?

Mr. Ward: I might suggest that counsel is again violating the rule, which your Honor laid down this morning.
Mr. Spratt: I will take the time. I will withdraw it if you want to.
The Court: Question withdrawn.

Q. What were the repairmen employed for?
A. For taking care of the apparatus.
Q. State whether or not that was taken care of before an actual break occurred?
A. Yes, sir.

By Mr. Ward:

Q. Did they know it was going to break down?
A. Well, there are accidents, you know, from time to time that breaks the wires and pipe lines, and all that sort of thing.

833 By Mr. Spratt:

Q. State whether or not apparatus will wear out.
A. Will it wear out?
Q. Will it wear out?
A. Oh, naturally.
Q. And state whether or not these repairmen inspect and ascertain before hand its condition, and whether it needs to be replaced?
A. Yes, sir, that is what they are for.

Mr. Spratt: That is all.

HARRY E. ARNOLD, was duly sworn as a witness in behalf of the defendant.

Direct examination.

By Mr. Spratt:

Q. Mr. Arnold, you live in Buffalo?
A. Yes, sir.
Q. Where are you employed?
A. Lehigh Valley Railroad Company.
Q. And what is your position?
A. Supervisor of Signals.
Q. How long have you occupied that position?
A. The past five years.
Q. You weren't present at the time of this collision, were you?
A. No, sir.
Q. You don't know anything personally about the collision?
A. Not a thing.

834 Q. Are you familiar with the kind of interlocking plan and switches that were used by the New York Central at Tower 55 at the time of this accident, as you see here in court?
A. I am.
Q. In a situation like this, assuming that this switch, the switch leading from the "Y" onto the main track, was open for the main line and closed for this "Y" track, with a single car going across there, in your experience can you say whether it would necessarily be derailed?
A. Not necessarily.

Q. And a switch which was open, of course that would take—well, tell us in case this switch were open from the "Y" track onto the main track, would there be anything to show from the appearance of the switch point if the car had made the switch, the open switch, onto the main line?

A. Nothing.

Q. Have you ever had any experience in conditions of that kind?

A. Yes, sir.

Q. Now, let me ask you if you will just make a little drawing of the switch in question on this blackboard. We will turn it around so that you can do that.

A. (Witness draws sketch on blackboard.) That is supposed to be the main track.

Q. The main eastbound track?

A. Yes. (Witness draws switch.)

Q. You haven't represented the westbound track there, have you?

A. No.

835 Q. You understand that at the westbound track there we a fixed frog? There being a frog there on the westbound track would that interfere at all with the movement of the car across it in either direction?

A. No, sir.

Q. The grooves are both ways, are they?

A. Yes, both ways, the main track or side track.

Q. So that the switch which would govern the movement would be to the eastbound track?

A. Yes, sir.

Q. Now, will you go ahead and explain to the jury what you have drawn there?

A. The switchpoint, this being the normal position of the switch at the present time (indicating), this point (indicating) being connected with a pipe line through pipes, cranks to the lever of the interlocking machine. That might be the pipe line going around at different angles to make a connection with the "V," (indicating)——

Q. I think the pipe line was on the other side.

Mr. Ward: It doesn't make any difference for purposes of illustration.

Q. Supposing you just put it on the other side.

A. (Witness changes sketch). It would be connected in here (indicating) with that rod, then come on out and go from there (indicating) to the tower, the lever, and that being the normal position it would be set for main line movements.

Q. What holds it in place?

A. Why, being connected with the pipe line, and then to the lever in the tower.

836 Q. That holds it in place?

A. In place.

Q. You have drawn the line across there (indicating). Should that be rubbed out?

A. That should be rubbed out. There would be an opening there.
Q. How about this one here (indicating)?
A. Well, this point comes up and goes over the top.
Q. Can you make it just a little clearer? I want you to show it open just when it was normal for the main track.

(Witness draws).

Q. Now, here is that switch set as you see it there?
A. It is set now for main line movements.
Q. So that the flange of the wheel coming in this direction——
A. The flange of the wheel will not pass the point.
Q. Indicating the southerly rail. How about the northerly rail?
A. The flange will pass between this rail (indicating) and the point to this opening (indicating).
Q. If you will here an arrow pointing in this direction.

(Witness places arrow on this sketch.)

Q. So that the switch is now set for a train coming to the left?
A. To the left, the point of the arrow.
Q. It being set in that situation how could a caboose going up in the direction (indicating) get out on the rail of the main track?
A. It could be pushed out, shoved out, and go out through here (indicating), and the flange of the wheel would slightly open the point from the stock rail sufficient and allow it to pass in the direction (indicating), crowd over the top of the point.
A Juror: Is there a spring there?
A. No, sir, no spring.
Q. It is just held in place from the inner?
A. Held by the pipe line and also plunger blocks, left blocks, as the previous witness testified. (Witness draws sketch). That goes through a slot here (indicating), in that manner.
Q. Is there some play allowed in the switch points?
A. There is a slight play, probably an eighth of an inch.
Q. Now, assuming that a caboose attached to an engine was being pushed up on the "F" on this switch track, collided with another engine going north on the eastbound track, and the caboose broke loose and went out onto the eastbound track, passing down some little distance, and the switch points were afterwards found to be less about a quarter of an inch, how, in your opinion, did that caboose get out there on that track?
A. Why, it was trailed through the switch.
Q. That is what you mean——
A. Trailing through.
Q. Does that happen frequently?
A. Occasionally, yes.
Q. Without the caboose itself being derailed?
A. Without the caboose—that is a light car like a caboose.
Q. And assuming that that caboose, as it was going northerly on the eastbound track, collided with a passenger train coming towards Buffalo, and the passenger train pushed it along there to a

Michigan Central engine that was derailed some distance south of the switch, and passed by the switch point down on the main track, what does that indicate to your mind what the condition of the switch points were?

A. That they had been run through or——

Q. That is, run through by the caboose?

A. Yes, trailed through or run through.

Q. Assuming that, and then when the train came back it passed down on its regular run down the main tracks, what does that indicate to you as to the way the switch was set at the time the caboose went over and on the main track?

A. Why, it would indicate to me that the switch was normal, as it is now.

Q. And set for the main track?

A. Set for the main track movement.

Q. If it had been set for the "Y" track movement where would that passenger train have gone when it came down there?

A. It would have gone down the "Y" track.

Q. Would a light car like a caboose going over it cause more or less damage to it than a heavy train or engine?

A. Less. Less damage.

Q. If the switch had been set for a movement of the "Y" to the main track and the caboose passed over it, would you have
839 found this bent condition of the points, assuming it was in good condition before?

A. No, you wouldn't have found any bent condition.

Q. How is the point of these needle switches, are they thick or thin?

A. They are shaped to a point.

Q. Will they bend before they break, with a light car like this going over it?

A. A light car would cause them to bend before they would break.

Mr. Spratt: That is all.

Cross-examination.

By Mr. Ward:

Q. You don't know anything about this situation out here, that is, at the time of the accident, do you?

A. No, sir.

Q. You work for the Lehigh?

A. Yes, sir.

Q. And you have come up here as an expert?

A. Well, to testify.

Q. You are in the signal business, aren't you?

A. Yes, sir.

Q. And you have charge of lights and that sort of thing?

A. Lights. Interlocking.

Q. When one of those switches is open there is a clearance between the points and the rail of 3 or 4 inches?
A. Three or four inches, yes.

Mr. Ward: That is all.

840 WALTER NEWMAN, duly sworn as a witness in behalf of defendant.

Direct examination.

By Mr. Spratt:

Q. You reside in this city, Mr. Newman?
A. Yes, sir.
Q. And what is your occupation?
A. Signal supervisor, New York Central, Buffalo Division.
Q. How long have you been such?
A. Coming six years.
Q. You weren't here at the time of the Kinney accident?
A. No, sir.
Q. Are you familiar with the signal apparatus known as the interlocking switch here in the court room?
A. I have had close onto 19 years experience with it.
Q. Is that one of the standard interlocking machines used by the railroads governing such a situation as we find at Tower 55?
A. A number of roads are using that type of machine as standard.
Q. Will you explain to the jury the principle of this interlocking switch?
A. Each lever on the machine is connected to a function outside, it may be a switch, signal or lock, and when those functions conflict the signalman cannot operate the levers. That is, if he has a signal clear for one direction he can't clear it for an opposite direction. The same with a switch. A switch cannot be thrown
841 until the lock lever has been thrown to unlock the switch, and that is taken care of on the machine by what we term interlocking. Interlocking consists of bars which are operated from the levers, and in turn lock with one another.
Q. Have you made a map or sketch here showing how these levers interlock?
A. Why, we have that type.
Q. (Counsel shows sketch to witness.)
A. That represents the interlocking on the machine at the back.
Q. That is the top of this paper, this drawing that I show you?
A. Yes, sir.
Q. What are the numbers on the upper part?
A. The numbers represent the bars that are connected to each lever.
Q. And the levers on the lower half of the drawing?
A. Yes, sir.
Q. And what do the red——
A. The red indicates what we will term as cross locking.

Mr. Ward: Did he say he made that?

Q. Did you make this or was it made under your direction?
A. No, sir.
Q. Have you examined it?
A. Yes, sir.
Q. Is it correct?
A. Yes, sir.

Mr. Ward: Who made it?

842 A. I couldn't say.

Q. What does the red represent there?

A. The red represents the cross locking and the yellow represents the longitudinal locking. That runs parallel with the machine.
Q. And the red represents——
A. Cross locking.
Q. Cross locking?
A. Yes, sir.
Q. And what does the black represent?
A. Represents the steel dogs that are riveted onto the longitudinal locking.
Q. And for instance when you pull one of these levers what effect does that have?
A. When the lever is pulled it operates the long bar which is shown there in yellow.
Q. The longitudinal bar in yellow?
A. In yellow. And as an illustration, there is a steel dog riveted onto that bar. You will note that it is butting up against the red cross locking (indicating), and in turn this end (indicating) is butting up against another dog. That shows that that bar cannot be moved until such time as this dog is moved out of the way.
Q. The upper black dog?
A. The upper black dog. Each lever is interlocked with another.
Q. That is, before you could move that black dog you would have to move some other lever?
A. Before we could move that one there (indicating).
Q. And that in turn communicates with the signals, or with the switches?

843 A. Yes, sir. If the proper route is not set up then it is a matter of impossibility to clear the proper signal.

Q. So that you couldn't give a clearance to a train going through?
A. Not unless the route was in proper condition for it.
Q. Could you give two contradictory signals?
A. No, sir.
Q. Would the machine prevent that?
A. Yes.

Mr. Spratt: I offer that in evidence.
The Court: Any objection to that?
Mr. Ward: No.
The Court: Received and will be marked in evidence.

(Sketch received in evidence and marked "Exhibit E.")

Q. Mr. Newman, the space through which these bars, the longitudinal bars that we have referred to, the space through which the bar would have to move is blocked by the opposing movement of the other block, is it, if it is not right?

A. Yes, sir.

Q. So that the conflicting signals shut each other off, so to speak, by one occupying the place of the other going through, and preventng these going through?

A. Two conflicting signals cannot be gotten.

Q. What is the length of the movement where you pull a lever?

A. Why, it is approximately eight inches. That is the stroke of the lever.

844 Q. What is attached to those levers for, take for instance, the switches?

A. We use what is termed a one-inch steel pipe.

Q. What was used for the signal apparatus, the lamps, at that time?

A. At that time we were using wire.

Q. I show you a coil of wire. Is that the kind of wire you used?

A. Yes, sir.

Q. What is the size of that wire?

A. It is what we term No. 9 B. W. G. gage.

Mr. Spratt: I offer that in evidence.

(Coil of wire received in evidence and marked "Exhibit F.")

Q. What is the strength of that wire?

A. Why, from tests that we have made it won't show any give until a pull of about 800 pounds is put onto it.

Q. What is the maximum pull that has to be put on a wire of this kind, say, for instance, the dwarf signal No. 6? You have heard it testified to here, haven't you, where it was?

A. Yes, sir. Of course that would vary, but in this case it was approximately about 180 to 200 pounds.

Q. And this, you say, has a strength of 800 pounds?

A. It won't show any give with a pull of 800 pounds. That is the first time it will start showing a give.

Q. So that the wire is about four times the strength that it would be called upon to carry?

A. Yes, sir.

Mr Spratt: You may examine.

845 Cross-examination.

By Mr. Ward:

Q. Mr. Newman, do you know anything about the condition of this tower in 1908?

A. No, sir.

Q. Whether it was working all right, or whether it was in proper repair you don't pretend to know, do you?

A. Hearsay. I heard it was working all right.
Q. Hearsay?
A. Yes, sir.
Q. Did you understand the question I asked you?
A. Will you ask me again?

(Question read.)

A. No.
Q. But the tower was examined by an eminent civil engineer of this city, Mr. Wing, about that time, wasn't it, the gentleman that sits here with Mr. Spratt on the trial?
A. I have been told that, Mr. Ward.
Q. What is that?
A. I was told of that.
Q. You were told that he had examined it?
A. Yes, sir.
Q. So that its particular condition was you yourself don't know?
A. No.
Q. Where did you work then in 1908?
A. I was in Albany.
Q. For the New York Central?
A. Yes, sir.
Q. In the same line of business?
A. Yes, sir.
846 Q. And you have come here since when?
A. April of 1913.
Q. And have been here ever since?
A. Yes, sir.
Q. What is your position now?
A. Signal supervisor.
Q. You are the head of all this business around Buffalo here?
A. I am the head of the Buffalo Division.
Q. Does that include all these towers out in this section?
A. Yes, the maintenance and construction; not the operation.
Q. That is, the Black Rock and Tonawanda, and all those towers?
A. Yes, sir.
Q. I suppose they are all in good condition since you have been here?
A. We try to keep them in good condition.
Q. They don't fail to operate part of the time?
A. Occasionally they fail.
Q. They do fail occasionally?
A. Occasional.
Q. Do they fail half the time?
A. I beg your pardon?
Q. They don't fail half the time, do they?
A. No.
Q. You could take your pocket monkey wrench and change the adjustment of that whole machine, couldn't you?
A. I didn't quite get that.
Q. You could take your pocket monkey wrench and change the adjustment of that machine, couldn't you?

847 A. What do you mean by adjustment, Mr. Ward?

Q. The way it is set up now certain levers respond, it is set up to make certain movements. You could set it up and make other kinds of movements, couldn't you?

A. Not with a monkey wrench.

Q. Well, with some other tool?

A. No, not with another tool.

Q. You could disconnect the locks, for instance, couldn't you?

A. There are no locks on that machine.

Q. No locks?

A. No, sir.

Q. You could disconnect the signal that goes to No. 6 entirely, couldn't you?

A. Disconnect what?

Q. The lever that operates No. 6 signals from the chains?

A. I could disconnect it, yes.

Q. That machine could be operated without any reference to No. 6 couldn't it?

A. The operator would know immediately if that lever was disconnected.

Q. He would know it if he took hold of the lever, wouldn't he?

A. Yes, sir.

Q. And he wouldn't know it in any other way, would he?

A. No.

Q. Getting down to a concrete case, if Mr. Reithenburg came on duty at 4 o'clock, and didn't touch that lever that runs out to
848 No. 6 from that time until the time of the accident, he would have no means of knowing whether the connections between that lever and that light were in proper order or not, would he?

A. No.

Q. And you could operate the balance of the signals and switches?

A. Yes, sir.

Mr. Ward: That is all.

Redirect examination.

By Mr. Spratt:

Q. If the signals and switches were set for the main tracks state whether or not that would interfere with the operation of signals on the "Y" track. In other words, could you give an engine on the "Y" track a right to go out on the main track without first changing the signals on the main track?

A. You would have to change the signals on the main track.

Q. So that they would have inter-dependence on each other in that way?

A. Yes, sir.

Q. So that if the signals were set normal for the main track would that automatically block the signals and the switches on the "Y" track?

A. I don't quite understand you, Mr. Spratt.

Q. I say, if the signals and switches were set for the main track would that not automatically block the signals and switches for the "Y"?

A. Yes, sir.

Q. In other words, you couldn't have them set for both tracks at the same time?

849 A. No, sir.

Q. One would exclude the other?

A. Yes, sir.

Mr. Ward: Counsel is still testifying. I think I ought to move to strike out the answer to those last three questions on the ground that the questions were leading and suggestive.

The Court: Well, of course they were leading. Counsel knows the rule against leading questions.

Mr. Spratt: It is simply something that has been gone over. If it was on my direct examination of course I would——

The Court: I am not going to strike it out. He has got the testimony now. I am going to let it stand. If there is a good deal of it done I am going to instruct the jury what a leading question is, what it means. A leading question, gentlemen, I will tell you now, means when the counsel asks a leading question that is a question which suggests the answer that the counsel wants to be given to that question, and you may take that into consideration in determining the weight to be given to such an answer.

Q. You said in answer to the counsel's question that occasionally signals failed. And then the counsel followed it up by asking you whether they failed half the time. Now, will you explain to the jury what you meant by "Occasionally fail"?

850 A. Any apparatus—in fact, any signal apparatus will fail in this respect, that we may have something dragging, some derailment, a heavy snow storm, a heavy sleet storm, which will afect the proper working of the signal apparatus, and when a signal fails to respond, that is when it fails to go from its normal to its clear position, why, that is what we call a signal failure.

Q. And that does occasionally happen under the conditions you have mentioned here?

A. Yes, sir.

Q. Now, assuming that the signals were set on the eastbound track for a train approaching from Niagara Falls, that they were green, that that train had the right of way, and assuming that when they got within six or seven hundred feet of the home signal it clanged to red, and assuming that just about that time the engineer noticed the green lights on the head end of the caboose that had been forced across the tracks and onto the eastbound track through a trailing switch, under those conditions what would you say was the cause of the signal changing from green to red?

A. May I ask you, how far the engine was away from the signal?

Q. The engine at that time, I think, was away, when the engineer noticed the signal, I th k some five, six or seven hundred feet.

A. He was approaching the signal?

Q. He was approaching the signal.

A. The fact of the signal going to danger would be caused by two features. One, by the caboose reaching the track circuit on the eastbound and in turn shunting the circuit. The circuit
851 ahead of that signal is bonded, and in turn it controls the home signal electrically, so that when a caboose or any part of a train should strike that circuit it will shunt the circuit and automatically restore the signal to stop. On the other hand, attached to those switch points is what we call a switch circuit controller. The switch circuit controller controls the controlling wire for that home signal—that is, electrical. The wire runs through that circuit controller attached to the switch points, and the switch points have to be in normal position within a quarter of an inch. Otherwise that circuit is open. At the time the signal was clear no doubt the points were up tight, normal or for the straight track. The action of the caboose running through the trailing points, splitting them, put the switch circuit controller out of adjustment, and that in turn would restore the home signal to danger.

Q. So that it could have been either one of those things that set the signal to danger?

A. Yes, sir.

Q. This wire, take, for instance, controlling No. 6 dwarf signal. That runs over pulleys, does it?

A. The wire in the main run is running through what we call wire carriers. They are small wheels with a groove inside in which the wire fits right into the groove. Where the wire turns around angles, or turns corners we have wheels, what we call horizontal wheels. They are approximately 8 to 10 inches in diameter,
852 made of cast iron or malleable iron, and that wheel is so arranged with a large slotting to it that the chain fits into that slot, so that in pulling the chain grips the wheels, and the slot is made so that there is very little likelihood of the chain pulling away from the wheel.

Q. And do those pulleys relieve the strain on the wires and the chains?

A. There is a very little strain on the pulleys. It is simply a matter that the wire is pulling straight and runs on the wheels. The strain is on the larger wheels where we are turning corners.

Q. And through those larger wheels what do they use, chains or wires?

A. Chains.

Q. Now, take a man that is in the tower operating the levers. Is he able to tell by the feel of the lever whether the signal is holding normally or not?

Mr. Ward: Objected to as incompetent and immaterial. Mr. Reithenburg has testified that he didn't take hold of this lever that led to dwarf 6 during the day.

Mr. Spratt: I am simply asking that question as a general question.

The Court: He may answer.

Mr. Ward: Exception.

A. Yes, sir.
Q. In what way does he feel it?
A. It would either pull much easier, or it would either pull much harder. If the wire was caught then the lever would pull hard. If the wire was broke then it would pull easy.
853 Q. Supposing a wire of this kind here, which has been introduced in evidence, should catch or kink on one of these pulleys, what effect would that have on the pull?
A. The power applied to those levers would break the carrier away from the support which was holding it, and the wire would remain as it is.
Q. And under such conditions as that where would the signal go?
A. If a man was clearing a signal it would clear. If he was putting it to the stop position it would go to the stop position.
Q. Automatically?
A. With the movement of the lever.

Mr. Spratt: That is all.
Mr. Ward: That is all.

JAMES E. BRODIE was duly sworn as a witness in behalf of the defendant.

Direct examination.

By Mr. Spratt:

Q. Mr. Brodie, you live in Buffalo?
A. Not just now. I live in Kenmore.
Q. Are you in the employ of the New York Central now?
A. Yes, sir.
Q. How long *had* you been in the employ of the Central?
A. Since 1894.
Q. And what is your duty now?
854 A. Yard conductor.
Q. Are you familiar with this North Buffalo yard?
A. Yes, sir.
Q. Have you been yardmaster in this North Buffalo yard?
A. Yes, sir.
Q. And how many years have you known that yard?
A. Why, from 1894 to the present time.
Q. Are you familiar with the track known as the fence track?
A. Yes, sir.
Q. What was that track used for?

Mr. Ward: When?

Q. All the time that you have known it, when you have been there from time to time?

Mr. Ward: I object to any use of it subsequent to the accident.

Q. Do you remember the accident to Mr. Kinney in 1908?
A. I heard of it.

Q. October 12, 1908?
A. Yes, sir.
Q. Prior to that time what was that track used for?
A. Why, whatever we see fit to use it for.
Q. State whether it was used for intra-state or inter-state or both?
A. Both.

Mr. Spratt: That is all.

855 Cross-examination.

By Mr. Ward:

Q. Mr. Brodie, this is your first appearance in the lawsuit, isn't it?
A. Yes, sir.
Q. And when were you yardmaster?
A. From 1894 until 1913.
Q. And that North Buffalo yard, of course the conditions have changed there very greatly since the great industrial development that we have had in recent years, I suppose?
A. Since I started out to be yardmaster, yes, sir.
Q. Especially since the war business started up there has been a great change out there, hasn't there?
A. Some, yes.
Q. Will you confine your recollection of things to the way it was prior to Mr. Kinney's accident and in the questions that I will ask you I will just relate to that time. This yard was the principal New York Central yard in the northwestern part of the city, wasn't it?
A. The northwestern part of the city, yes.
Q. And our city here lays along Niagara river, and crossing the river near this yard is the single bridge that crosses from Buffalo over to Canada?
A. Yes, sir.
Q. And coming over that bridge was a great volume of business both ways, was there not? A good many hundred cars a day of the Michigan Central and the Grand Trunk?
A. No, sir.
856 Q. And those cars were as a matter of daily routine delivered to your railroad?
A. Oh, no.
Q. A good many of them were?
A. A good many of them were. They might go to the Erie. Or they might go to the Delaware.
Q. The Central, I suppose, took the largest part of them?
A. No, I don't think that.
Q. You don't think it did?
A. No. The Delaware got the biggest part of them, I think.
Q. I suppose a good many cars came over there every day for your railroad?
A. Oh, yes.
Q. And a good many cars from your railroad went over there?
A. They were delivered to the Grand Trunk and Michigan Central, and they took them over themselves.

Q. These tracks were in daily use for the receipt of cars destined for Canada, were they not?

A. No, sir.

Q. Did you have other tracks for the use of cars destined for Canada?

A. We made up a run on every track we had room on, or whatever track we had fit.

Q. Just answer my question.

A. I can't answer.

Q. Did you have other tracks——

A. We had other tracks in the yard.

Q. Did you have other tracks that trains were placed on to go to Canada beside these tracks?

857 A. Yes, sir.

Q. Were trains placed on these tracks to go to Canada?

A. On the other tracks?

Q. On these tracks, the middle, the coal and the fence.

A. Yes, we have had trains for Canada on them tracks.

Q. Weren't trains placed on those tracks that came from Canada, delivered by the Michigan Central?

A. Yes, as business afforded it.

Q. Can you tell what was on those tracks in the month of October, 1908?

A. Hardly.

Q. Can you tell what was on those tracks on the 12th day of October, 1908?

A. No, sir.

Q. Can you testify as to a single day in the month of October, 1908, when every car on that track was a local car and there wasn't a single foreign car?

A. No, sir.

Q. Of course there were records of all those movements, weren't there, Mr. Brodie?

A. Well, they were supposed to be, yes.

Q. The New York Central had a record of every train that was placed on that track, and where it was going to, and where it would come from, didn't it?

A. Well, not always no, because a switch engine might come along there and pull a string of cars in there and leave it.

858 Q. But if a string of cars was standing in there on that track, and the conductor had the bills for them, and they were ordered to go to Black Rock, those bills would show what those cars were, wouldn't they?

A. What they were loaded with, yes.

Q. It would show where they come from too? Wouldn't it?

A. Yes, sir.

Q. And it would show where they were going to?

A. No.

Q. It would show where they came from and not where they were going to?

A. Show where they came from and not where they were going to.

Q. What becomes of those bills?
A. It goes to the Agent's office and you get another set of bills.
Q. And the conductor keeps a record to himself sometimes?
A. The road conductor?
Q. Yes, the yardmaster and the road conductor?
A. No, the yardmaster doesn't?
Q. The conductor has a book too, doesn't he?
A. The conductor is supposed to have a book, yes.
Q. When were you first approached on this subject, Mr. Brodie?
A. When was I approached on this subject here?
Q. Yes.
859 A. I was told Sunday to come up here Monday.
Q. That is the first you had heard about it?
A. Yes, sir.
Q. Ten years after the event?
A. Yes, sir.
Q. What is your age?
A. 66, past.
Q. And I suppose your memory is just as good as it ever was?
A. Just as good as any way at all.

Redirect examination.

By Mr. Spratt:

Q. You don't pretend to remember what was on the tracks, I understood you——
A. No, sir.
Q. For any particular day?
A. No, sir.
Q. I ask you whether there were occasions when there were intra-state cars on that track?
A. Yes, sir, there were several times.
Q. And were there occasions when there were inter-state cars on that track?
A. Yes, sir.

Mr. Spratt: That is all.

Recross-examination.

By Mr. Ward:

Q. When were some of the occasions when there were intra-state cars on the tracks prior to October, 1908? You don't know, do you?
A. No.
Q. You don't know what those——
860 A. The only record I kept was up here (tapping head with finger). I don't know what was on the tracks from day to day.
Q. You have just answered Mr. Spratt that there were occasions when all the cars on those tracks were intra-state.

A. Oh, yes. I know that myself, yes, that way, but I thought——
Q. When were those occasions?
A. I don't know what days they were. There were days they were that way, but I couldn't tell you the days.
Q. Where did those cars come from and where were they going to, if you know they were all intra-state?
A. I don't know where they came from or where they were going to. They were all going east. Going to East Buffalo.
Q. Where they were going after that, whether they were going to Pennsylvania or Massachusetts you don't know?
A. No. That didn't bother me at all.
Q. You don't know where they came from either, do you?
A. I might if I had seen them, yes.
Q. But you don't know now?
A. No, I don't pretend to know.

By Mr. Spratt:

Q. You mean you can't recall now where they were going?
A. No.

Mr. Ward: Now, we object to that as leading and suggestive. That is a flagrant illustration.

861 The Court: The jury will remember the definition I gave of a leading question.

Q. What do you mean by stating that you don't recall now?
A. I couldn't tell what was on the track from day to day.
Q. Is that what you mean?
A. Yes, sir.
Q. That you couldn't tell now where they were destined for?
A. No, I couldn't tell now.
Q. But at that time state whether you knew they were cars that originated in the State of New York and were destined for points in the State of New York?

Mr. Ward: I object to that as leading and suggestive.
The Court: Yes, that is under the same objection. The objection is sustained.
Mr. Spratt: I asked him whether or not.
The Court: Read the question.
(Question read).
The Court: He may answer.

A. At what time?
Q. At the time that the cars were on the tracks out there.
A. Yes, I knew there were different kinds of cars there, yes.
Q. And state in answer to my question whether you knew at that time that they were intra-state cars?
Mr. Ward: I object to that as leading and suggestive.

862 The Court: I will let him answer.

Q. Whether or not you knew it at that time?
A. Not until we got the bills.

The Court: We have gone over this pretty fully.

Mr. Syrett: All right. I won't press it. I will read the testimony of Samuel Mann, page 979, last trial.

(Mr. Syrett began reading as follows:)

"SAMUEL MANN, called in behalf of the defendant, and being duly sworn, testified as follows:

Direct examination.

By Mr. Hollister:

Q. Mr. Mann, are you employed by the New York Central?
A. I am.
Q. And in what department?
A. Division Accountant of the Superintendent's office.
Q. And how long have you been so employed?
A. Over 20 years.
Q. So that you were Division Accountant in 1900?
A. I was.
Q. I show you this contract between the New York Central and the Michigan Central, governing terminal facilities, and ask you whether in regard to the Black Rock transfercage certificate was any written contract in existence in 1900?

(Showing contract referred to to witness.)

A. No."

Mr. Ward: I ask that the answer be stricken out. I want to save my objection. Did your Honor have in mind the question?

The Court: I didn't very closely.

(Mr. Syrett read the question again.)

The Court: Out of deference to a senior judge I ought to rule with him.

Mr. Ward: There was an effort made to get some paper in evidence by Mr. Mann. It turned out that it was not a contract.

Mr. Syrett: We claim that it was.

Mr. Ward: It seems to me that Mr. Syrett, instead of reading the testimony, ought to make his offer of the paper and let your Honor pass on the paper. This is a very awkward way to get at it.

Mr. Syrett: I will offer that.

The Court: That is, the alleged contract?

Mr. Syrett: Yes.

The Court: This is bearing on the question of intervening contracts?

Mr. Ward: There was some contract made after this event.

Mr. Syrett: But dating back to cover the time.

Mr. Ward: No, how could a contract date back? It was made after the event, and was ultimately rejected by Judge Wheeler on the ground that it was made after the event.

The Court: If the Judge Wheeler ruled on it that way I ought to follow him, I think.

(Mr. Spratt resumed the reading of the Direct Examination as follows:)

"Q. If there were any contracts governing that local yard would those contracts be in your office, go through your office?
A. They would be.

Mr. Ward: I object to that on the same ground. This man is not an officer of the company.
The Court: I will give you the exception.
Mr. Ward: Exception.
Mr. Hollister: Mr. Ward is not challenging the correctness, the authenticity of these original signatures.

Q. In 1908 do you know personally of the arrangement between the Michigan Central and the New York Central governing the proportionate use of the tracks in that Black Rock interchange yards?
A. There was no written agreement at that time in existence, but there was a verbal understanding.
Q. What was it?

Mr. Ward: I object to that, on the grounds the witness is not qualified to answer, and incompetent and immaterial.
The Court: Who made it, that is the question. Let us see.

865 Q. Can you tell us from what you know of your own accountant's office what the proportion was of payments made on those interchange tracks?

Mr. Ward: I object to that as incompetent and immaterial.
The Court: He may answer that yes or no.

A. The basis of payment——

Mr. Ward: No, the judge said you could answer yes or no.
The Court: Not whether it was, but whether you knew.

Q. Do you know, first?
A. I did, yes.
Q. Now, what was it?

Mr. Ward: I renew my objection, on the ground it is incompetent and immaterial. The basis of payment does not relate to the use of the tracks at the time of this accident; this is not an officer of the company; there could not be a binding agreement here unless it was by some official act of the company. If it was mere use then it would have to be shown by those who are familiar with the use, as I showed it.
The Court: I will take it, and give you the exception.
Mr. Ward: I except.

Q. You may state, Mr. Mann, what the arrangement for payment was?

A. The basis of payment?

866 Q. The basis of payment.

A. Was that the Michigan Central should bear their proportion of the expense of the interchange yards in which these tracks are located, the percentage which the number of cars handled on their account bore to the total number of cars handled in the interchange yards.

Q. And do you know what that percentage was?

Mr. Ward: Just a moment. In what year?

Q. 1908?

A. It varies from month to month.

Mr. Ward: I object, on the same ground as stated in my last objection.

By the Court:

Q. From year to year?

A. Form month to month.

By Mr. Ward:

Q. From month to month?

A. Yes, sir.

Mr. Ward: The same objection and exception.

Q. Approximately?

A. The approximate estimate was about eight or nine per cent.

Q. The approximate estimate was about eight or nine per cent?

A. Was the Michigan Central's proportion, yes, sir.

867 Q. Did there come a time afterwards when the verbal arrangements in existence between the New York Central and the Michigan Central were incorporated in a contract that went through your office?

A. That is the one that you have in your hand.

The Court: That calls for a conclusion. He may state that such and such a contract was made, and that is the one you have in your hand, I suppose.

The Witness: Yes.

Q. I show you this contract that was executed June 24th, 1914, and ask you if that was the contract, and the only contract, made pertaining to the arrangement existing in 1908 covering those interchange tracks?

A. Yes.

Mr. Hollister: I offer the contract in evidence.

Mr. Ward: I object to it. The contract on its face shows——

The Court: Well, I will exclude it, and give you the exception."

Mr. Ward: It would be merely a recital and that would be hearsay.

Mr. Spratt: We claim it covered an antecedent period.

The Court: The judge excluded it?
Mr. Spratt: Yes, he excluded it.

(Mr. Spratt resumed reading as follows:)

"Mr. Hollister: Well, is there any more proof that would be necessary to prove it, your Honor, or do you think that he has shown enough?

868 The Court: I think you will have to stand on the verbal arrangement as it stood. Of course that may be practically the same, but you stand on what they paid, what percentage.

Mr. Hollister: Yes.

The Court: It may throw some light on the amount of business that was done.

Mr. Hollister: I will take the exception. That is all, Mr. Mann."

The Court: That doesn't seem to help very much.

Mr. Spratt: It isn't finished yet.

Mr. Ward. I don't care about it.

Mr. Spratt: If the counsel doesn't want to read his cross examination I would like to read it, because it throws light on it.

Mr. Ward: I waive it, Mr. Spratt.

Mr. Spratt: I would like to read it, make it my testimony, so far as that is concerned.

Mr. Ward: No, you can't do that. I have got a right on this trial not to cross examine a witness. Because I cross examined him on some other trial I am not obliged to cross examine him this time.

The Court: Why, that is his choice, I think, whether he wants his cross examination in or not. As far as I can see on this direct examination it has amounted to nothing.

Mr. Spratt: You see I have a re-direct examination, and that brings that out.

Mr. Ward: You have got a right to read all that you want.

869 If you had the witness here I might want to cross examine him differently than I did the last time.

The Court: Now, we have reached the time for adjournment.

(Adjournment until Wednesday, February 5, 1919, 10 A. M.)

Proceedings of Wednesday, February 5, 1919, 10 A. M.

Mr. Spratt: I will read the testimony of James J. Cunningham, re-called, page 877, fifth trial.

Mr. Spratt reads as follows:

"JAMES J. CUNNINGHAM, re-called, in behalf of the defendant, testified as follows:

Direct examination.

By Mr. Hollister:

Q. Did you, at my request, make a measurement of the distance from the pilot beam of the class of engine of 2499 back to the back of the engineer's seat in the cab?

A. I did.
Q. What was the exact measurement?
A. 36 feet.

Mr. Hollister: That is all.

Cross-examination.

By Mr. Ward:

Q. You did not measure 2499, did you?
A. No.

Redirect examination.

By Mr. Hollister:

Q. It is the same class, though, you say?
A. Yes, sir."

870 Mr. Spratt: I will read the re-direct examination of Mr. MANN, page 884, fifth trial.

Mr. Spratt read as follows:

"Redirect examination.

By Mr. Hollister:

Q. And there were a large number of cars that were local cars from the industrial plants there, and from Buffalo, that were made up there in that yard and taken to East Buffalo at points solely within the state?

Mr. Ward: Just a moment. This case was not held open for that purpose. I object to it, as incompetent and immaterial.
The Court: He may answer.
Mr. Ward: I except.

Q. Is that a fact?
A. What was the question?

Mr. Hollister: Just read the question.
Mr. Ward: I also include in my objection witness not qualified to answer.
The Court: Of course if you do not know you will not answer.
The Witness: That is the reason I wanted to have the question repeated, sir.
The Court: Yes.
Mr. Hollister: Will you just read that?

(Last question read by the stenographer as follows: And there were a large number of cars that were local cars from the industrial plants there, and from Buffalo, that were made up there in
871 that yard and taken to East Buffalo at points solely within the state?)

A. Yes.

Mr. Hollister: That is all."

WILLIAM E. DEHN, was duly sworn as a witness in behalf of the defendant.

Direct examination.

By Mr. Spratt:

Q. Mr. Dehn, you live in the City of Buffalo?
A. Yes, sir.
Q. You work for the New York Central?
A. Yes, sir.
Q. How long have you worked for the New York Central?
A. Since 1889.
Q. Were you working for the New York Central in 1908 in October?
A. Yes, sir.
Q. In what capacity?
A. Night General Yardmaster.
Q. Did that include the North Buffalo yards?
A. Yes, sir.
Q. There was testimony here that Mr. Kinney's engine or crew was ordered to take a train of cars from the fence track and take them to East Buffalo. Do you know where the fence track is?
A. Yes, sir.
Q. What was that track used for in 1908 and prior to that time?
872 A. It was used for connection of cars, the Central and Black Rock territory. It may be used for delivery to the Michigan Central or from the Michigan Central. It was not set aside for any particular certain purpose.
Q. Not assigned for any particular certain purpose, you say?
A. No, sir.
Q. What kind of trains have you seen there on the fence track?
A. I have seen trains from the Michigan Central. To the Michigan.
Q. And others?
A. I have seen others of the Central and Black Rock territory.
Q. Have you seen intra-state trains there?
A. My recollection, I remember one train of grain that was pulled from the Evans' elevator and placed on the fence track. This I was told by the night yardmaster, Mr. Herbert.

Mr. Ward: I object to that as hearsay and ask that it be stricken out.

The Court: Yes, something that he was told by somebody he can't tell.

The Witness: My handling of the business was directly with the night general yardmaster at that point.

Mr. Ward: I ask that what the man told to Mr. Dehn be stricken out as hearsay.

The Court: Strike out whatever was told him.

Q. Did that information come to you in your official capacity as yardmaster?

A. Yes, sir.

873 Q. I ask, were you informed on a certain occasion that there was a train of intrastate cars on the fence track by your subordinate?

Mr. Ward: I object to that as incompetent and hearsay.

The Court: Objection sustained.

Mr. Spratt: Exception.

Q. State whether or not this track was used both for inter-state and intra-state?

A. Yes, sir, it was.

Q. Was it also used for mixed inter-state and intra-state?

A. Yes, sir.

Q. What was done with the records of your yard there, for instance the trains that were on this fence track?

A. The records of all trains are only retained for six years. After that they are destroyed.

Q. By whose directions?

A. It is under the Inter State Commerce Commission, the act of June 8th, 1914.

Q. Under that were the records showing the cars that were on the fence track on October 12, 1908—would they be destroyed under that same order?

A. Yes, sir.

Mr. Spratt: You may examine.

Cross-examination.

By Mr. Ward:

Q. So that there was a record of the train that was on that fence track, wasn't there, Mr. Dehn?

A. Yes, sir, there was at a time.

874 Q. I have been trying to get it for the last two years, haven't I?

A. Yes, sir, I remember that.

Q. I had you up here as a witness for the plaintiff a couple of years ago?

A. Yes, sir.

Q. Asking you for it?

A. Yes, sir.

Q. And at that time you testified that it was destroyed?

A. Yes, sir, I did.

Q. Your position with the New York Central is a very important one, isn't it, Mr. Dehn?

A. I think so.

Q. And you have a good deal to do?
A. Yes, sir.
Q. Your office is located where?
A. East Buffalo.
Q. You have a good many men under you?
A. Oh, approximately 425 or better.
Q. At this time back in 1908 you were doing the same class of work that you are now, except that you were the night yardmaster?
A. I was the night general, whereas I am the day general at the present time.
Q. With your office in East Buffalo at that time?
A. Yes, sir.
Q. So that you had no personal contact with the daily work on these switches, did you? It would be through your subordinates, wouldn't it?
A. I worked through my assistants, of course, but I occasionally oversee the game.
875 Q. Your business kept you generally at your office in East Buffalo?
A. Principally.
Q. Which was 5 or 6 miles from this place?
A. It sure is.
Q. Of course, having a general acquaintance with the condition of commerce throughout your territory you knew that there was a large daily interchange movement of cars between your railroad and the Michigan Central?
A. Yes, sir.
Q. You knew that? And every day a great many cars from the Michigan Central were delivered to your railroad?
A. Yes, sir.
Q. And every day a great many cars from your railroad were delivered to the Michigan Central?
A. Yes, sir.
Q. And these tracks were the place where a considerable part of those cars were placed by the Michigan Central for delivery to you and by your railroad for delivery to the Michigan Central?
A. Yes, sir.
Q. And that went on every day, didn't it?
A. Yes, sir.
Q. Even with cars originating in the Black Rock district it is a very rare and unusual thing to find a train of those, some one of which is not destined for a point outside the state, isn't it, Mr. Dehn?
A. Yes, sir.
Q. Have you any personal knowledge during the whole of
876 1908 of a single train on those tracks that did not contain some car that had either come from out of the state or was destined for a point outside of the state?
A. I know of one particular train, but of course I wouldn't say as to that.
Q. Have you any personal knowledge of it?
A. Not personally, no.

Q. Only what somebody told you?
A. Only that I was advised by the yardmaster.
Q. My question called for personal knowledge.
A. I understood what you said.
Q. There isn't any question but what you told us when you were here as a witness for the plaintiff two years ago was correct, that these three tracks were generally used for the interchange movement between the New York Central and Michigan Central?
A. They were used—I said at the time that they were used for the Michigan Central, or from the Michigan Central, or a collection of cars that was gathered in the Black Rock district. It was used for the making up of trains intended for East Buffalo.
Q. And those trains came, to a large extent, from across the bridge at that time, did they not?
A. A certain portion of them did.
Q. And also those tracks were used for trains that you intended to go across the bridge, weren't they, Mr. Dehn?
A. Yes, sir.
Q. And that was a daily matter?
A. Yes, sir.
877 Q. A great majority of the cars that came across the bridge were delivered to your road at that time, weren't they, Mr. Dehn?
A. Quite a number of them. Not all of them.
Q. The cars that do come across the bridge to be delivered to your road were handled on those three switches at that time?
A. I wouldn't say for certain they would always be handled on them switch tracks. Wherever they have the room is the way we handle them.
Q. Do you remember my asking you that same question the other time you were sworn, page 168? "Q. And many of those cars and trains which come from cross the International Bridge, and which go across the International Bridge, are handled on those three switch tracks?" And did you answer: "A. Yes, sir."?
A. I did.
Q. Do you say that now?
A. I say it yet.
Q. And were you asked again, Mr. Dehn: "Q. And this Black Rock yard and these three tracks that we have spoken about were used in part for assembling trains that were to go across the bridge?" And you answered: "A. Used for assembling trains that go into our East Buffalo yard." Is that correct?
A. Yes. I said that here.
Q. You say that now?
A. Yes, sir.
Q. Who would be the man who would have the record—I mean at that time who would be the man that would have the
878 record of the train that Mr. Kinney was ordered to move that night?
A. Who would have the record?
Q. Who would be the man who would handle it at that time?

A. At that time?
Q. Yes.
A. It should be retained right at the Black Rock yard office.
Q. What shape is that record in? Is it in a book, or in a separate sheet, or what is it?
A. They have a train sheet. It is copied into a tissue book.
Q. So that there are two, a train sheet and tissue book?
A. Yes, sir.
Q. And that shows the destination of each car?
A. Yes, sir, where from and where to.
Q. Your local stuff that arises in Black Rock there, is it generally loads or empties?
A. It is both.
Q. And the empties are made up of a large part of empty coal cars, aren't they?
A. Quite a number of them.
Q. And those are intended to be sent back to Pennsylvania or the coal mines?
A. Well, not necessarily. They may be sent to the ore dock for the loading of ore.
Q. To take ore back to the mines?
A. No, the loading of ore goes east, goes to Charlotte or some point east.
Q. And the loads are cars which originate in Black Rock,
879 which may go anywhere in the United States?
A. They may, yes, sir.
Q. And the only thing that would show that for sure are the records?
A. Exactly.
Q. You had three local tracks where there was a scale at that time?
A. Yes, sir.
Q. This local freight that originates in Black Rock, in order to enable you to fix the freight, has to be weighed as a rule, doesn't it?
A. Yes, sir.
Q. Those three tracks, one of which was called a scale track, they were in another part of the yard from these interchange tracks, weren't they?
A. Exactly, yes, sir.
Q. There was no scale at these interchange tracks?
A. No, sir, not that I know of.
Q. This train sheet and these tissue records, do you know anything personally about their being destroyed?
A. I didn't see them destroyed personally, no, sir, I didn't. That is the way we have to handle them.
Q. Do you know who did destroy them?
A. I couldn't say who destroyed them. I didn't see the party——
Q. Whose custody would they be left in after 1908?
A. After 1908?
880 Q. Yes.
A. They would be retained right at the yard office wherever they had them.

Q. Have you looked down there for them?
A. No, sir, I have not.
Q. You haven't looked?
A. No, sir, I don't figure on finding any such records as that.
Q. What?
A. I wouldn't figure on finding any such records.
Q. You haven't looked, have you, Mr. Dehn?
A. No, sir. I have not.

Mr. Ward: All right.

Redirect examination.

By Mr. Spratt:

Q. You know they were ordered destroyed, do you?

Mr. Ward: How does he know? I object to that as leading and suggestive.

Q. Do you know whether they were ordered destroyed?
A. I know all our records are of trains going to the Rock, and I suppose they are at the Black Rock end as well as this end of it.
Q. That is a general order?
A. That is a general order.

Mr. Ward: I object to that as leading and suggestive.
Mr. Spratt: He has already testified to that.
The Court: It is subject to that objection.
881 Mr. Spratt: I will withdraw that. I will take all the time which is necessary.
The Court: That is an error which is frequently made here, and a good deal of the time is overlooked.
Mr. Spratt: I had supposed we were trying to get through with this lawsuit and not waste a whole lot of time.

Q. I will ask you, with all formality now, you have testified that the Interstate Commerce Commission issued an order to destroy all records after 6 years?
A. Yes, sir.

Mr. Ward: I object to that. Just a moment please. I object to that. I haven't heard of any such testimony. If there is any such order, the order is the best evidence.
The Court: I understood that he testified that way.

Q. Mr. Dehn, you have seen that order?
A. Yes, sir.
Q. State whether the order you saw applied generally?

Mr. Ward: Just a moment. I object to that. The order is the best evidence.
The Court: I suppose that is so. The order is the best evidence.
Mr. Spratt: We would have to send and get it at the Interstate Commerce Commission. It was proved at the other trial and there was no question raised about it.

The Court: I am only following the rules of evidence as I understand them.

882 Mr. Spratt: I am telling you why we didn't send and get a certified copy, because it was admitted at the other trial.

Mr. Ward: If there is such an order you must have it. You can produce the order. You need not bother to certify it.

Mr. Spratt: I will have a ruling on that, and we will have it ended. I am not going to press the matter.

(Question read.)

Mr. Ward: Objected to on the ground that the order itself is the best evidence.

The Court: Objection sustained.

Mr. Spratt: An exception.

Q. Mr. Dehn, it has been testified here that the arrangement at Black Rock was that the maintenance of these tracks, the interchange tracks you have spoken of, was paid for in proportion to the use of these tracks between the New York Central and the Michigan Central?

Mr. Ward: I object to that as incompetent and immaterial, and an incorrect statement of the evidence. There is no such evidence.

The Court: Does he say that he said that?

Mr. Spratt: It has been proved here.

The Court: I will let it in.

Mr. Ward: There hasn't been any such proof.

The Court: There was some record of that kind that I recall. I have it right here that I wrote Mr. Mann's testimony, so that there could be no question.

883 Mr. Ward: This was testimony which was read by Mr. Spratt for the purpose of getting the contract in, which was ruled out by your Honor.

Mr. Spratt: They ruled the contract out, but it was not ruled out, the percentage which the New York Central and Michigan Central paid. The question here was asked Mr. Mann, and he says "It varied from month to month."

"Q. Approximately?

A. The approximate estimate was about eight or nine per cent.

Q. The approximate estimate was about eight or nine per cent?

A. Was the Michigan Central's proportion, yes, sir."

Mr. Ward: Of course it seems to me that if Mr. Spratt has any direct question to ask the witness it ought to be asked without reference to somebody else's testimony. That is only another form of leading the witness and telling him what he wants him to testify to.

Mr. Spratt: Very well. I will put it with due formality.

Q. Assuming, Mr. Dehn, that it had been testified here that the approximate division of maintanance of those tracks between the New York Central and the Michigan Central in proportion to the number of cars used was eight or nine per cent for the Michigan Cen-

tral would that in your opinion be about the proportionate use the Michigan Central had of those tracks?

884 Mr. Ward: Just a moment. That is incompetent and immaterial. It is calling for this witness to express an opinion based upon somebody else's opinion.

The Court: Of course I am not going to admit it in that shape. This man is not here to give opinions.

Mr. Spratt: I am content with an exception.

The Court: Very well.

Q. Mr. Dehn, was there considerable freight originating right in the Black Rock territory in 1908 and before that?

Mr. Ward: Objected to on the ground that this question has already been asked of Mr. Dehn and gone over on both direct and cross examination.

The Court: Objection overruled. I will let him tell, if he can, anything further about it.

A. Yes, sir.

Q. Was that product handled on the fence track, some of it?

A. Some of it was.

Q. State whether or not some of that product was sent to points within the State of New York.

A. It undoubtedly was.

Q. Was there considerable rain handled from the elevators in the harbor here and carried out by way of Black Rock?

A. Yes, sir.

Q. And handled on the fence track?

A. It might be in exceptional cases. Otherwise they run it straight through.

885 Q. Do you know of it being handled on——

A. I heard tell of it, yes.

Mr. Ward: I object, and I ask that the answer be stricken out on the ground that it is hearsay.

The Court: Strike it out.

Mr. Spratt: Exception.

Q. Do you know of grain going from the elevators here to points within the State of New York?

A. Yes, sir.

Q. At what points would you say within the State of New York that it went to?

A. Syracuse, Albany, Hudson river, New York.

Q. Any to Lockport?

A. Yes, sir.

Q. Was there iron ore sent over those tracks?

A. Which tracks? Over these tracks?

Q. Yes.

A. No, sir.

Mr. Spratt: That is all.

Mr. Ward: That is all.

WILLIAM LESLIE KELLS, was duly sworn as a witness in behalf of the defendant:

Direct examination.

By Mr. Spratt:

Q. Mr. Kells, where do you live?
A. Tonawanda.
886 Q. Are you working for the New York Central?
A. Yes, sir.
Q. How long do you say you have worked for the New York Central?
A. Ever since the spring of 1907, May the 4th.
Q. What have you been doing?
A. I have been taking care of lamps part of the time and also——

The Court: I don't hear you.

A. I first started to take care of lamps. After that I got promoted to take care of switches and what they call assistant maintainer of automatic signals and so on.
Q. In 1908 what were you doing?
A. Lamp man, what they call a lamp man, taking care of lamps.
Q. What territory did you have?
A. My territory in 1908 was from Tower 57 to Hertel avenue.
Q. Tower 57 is located where?
A. In Tonawanda.
Q. And the other tower is down in the vicinity of Hertel avenue?
A. Yes, sir.
Q. Did that include the territory around Tower 55?
A. Yes, sir.
Q. On October 12th were you workin there?
A. Yes, sir.
Q. Doing this work?
A. Yes, sir.
Q. You lived at Tonawanda, did you?
A. Yes, sir.
887 Q. What time did you start in?
A. Seven o'clock in the morning.
Q. Tell the jury where you started and what you did.
A. My work was to start at Tower 57 in the morning, taking care of the lamps, take them down off the pole, fill them, light them—have them fixed for the afternoon so that I could light them, and put them back up on the poles again. The rest of the time when I wasn't doing that I was taking care of the towers and looking after switches and inspecting things around, wires and so on.
Q. On October 12th did you start in at Tonawanda?
A. Yes, sir.
Q. Did you do this work along the line?
A. Yes, I started in the morning and worked up towards Tower 55, Hertel avenue.

Q. About what time did you get to Tower 55?
A. Around 11 o'clock.
Q. What time did you finish your work in cleaning the lamps and getting them in shape?
A. Around 11 o'clock.
Q. Then did you have a lay-off?
A. My other work was taking care of towers and looking after switches and wires and so on. I mean the towers and windows and so on.
Q. Do you know dwarf 6?
A. Yes, sir, I do.
Q. What did you do with reference to that when you came there?
A. When I first started there I took the lamp down and cleaned it, and in the afternoon I laid it up and put it back on there
888 again. Also it is my duty to look over things and see that everything is in first class condition.
Q. What inspection did you make of the lamp? You say it was your duty to make inspection?
A. It was my duty to see that the wires were in first class condition, also to see that the bracket—there was no chance of the lamp tipping over. The lamp sits on a bracket and you want to be careful when you sit your lamp on that she hasn't a nut out or bolt out, anything that is liable to tip your lamp, and to be sure that your lamp is lit up so that it will stay there until the next day.
Q. What time did you light your lamp?
A. Around 3.30 in the afternoon.
Q. What was the condition of the lamp and wires and apparatus at that time?
A. When I left them they was in good condition.
Q. What was the light?
A. The light showed purple when I left it there.
Q. Purple?
A. Yes, sir.
Q. And when you say the lamp and apparatus was in good condition, how much apparatus do you refer to?
A. Well, the wires and dwarf and lamp.
Q. How about the wires leading to the tower?
A. I went right along the wires, and the main thing is to be careful, they ain't twisted or kinked. As far as I could see they was straightened out and working and O. K.
Q. By O. K. you mean what?
889 A. Well, in good condition.
Q. You have got to talk out loud.
A. As far as I could se they was in good working condition. You understand what that means—their working condition is all right. That is the way I would put it.
Q. How about the other lights on the signals connected with Tower 55? What did you do with reference to those?
A. My duty was to light them and put them up in the same shape.
Q. Did you examine those too?
A. Yes, sir.

Q. What were their condition when you left them?
A. In first class condition.
Q. And then after you finished at Tower 55 where did you go?
A. Tower 55, my duty was to go from there to Tonawanda, along the lamps and light them and put them back on the poles again.
Q. And did you do that?
A. Yes, sir.
Q. State whether or not you had to have them lit before darkness came?
A. Yes, sir, my duty is to have them lit before dark.
Q. And about — time did you get home?
A. My quitting time there was six o'clock. I got home around about 15 minutes after 6.
Q. Did you hear of the Kinney accident?
A. Yes, sir.
Q. When did you hear of it?
A. The next morning, 7 o'clock.

Mr. Spratt: That is all.

890 Cross-examination.

By Mr. Ward:

Q. And you have been in the employ of the New York Central ever since, haven't you, Mr. Kells?
A. Yes, sir.
Q. You have been promoted since?
A. Yes, sir.
Q. What are you now?
A. Assistant maintainer.
Q. When did you get promoted?
A. I got promoted the 10th day of January, 1910.
Q. To assistant maintainer?
A. Yes, sir.
Q. Have you been holding that place ever since?
A. Yes, sir.
Q. You never were sworn as a witness in this case until eight years after the accident, were you?
A. Two years ago.
Q. What?
A. 1917, I think. The last two trials.
Q. Last two trials you were sworn?
A. Yes, sir.
Q. That was the first time?
A. Yes, sir.
Q. You weren't sworn on the first three trials, were you?
A. No, sir, I was not.
Q. You were right in the employ of the company all that time?
A. Yes, sir.
Q. And knew just as much about it as you know now, didn't you?

A. Yes, sir.

801 Q. You always knew this that you have been telling here?

A. Yes, sir, I did. I was right on the job all the time.

Q. I suppose that you can tell us about the other dwarfs and how they showed that day, can't you?

A. Yes, sir, I can tell you at that time.

Q. Can you tell me now?

A. I lit them up and put them in first class condition.

Q. Can you tell us what color they showed?

A. Why, I can tell you very close to it. At that time the condition of that signal and one thing and another——

Q. Tell us about some others. What other dwarf did you handle that day that you put a light in?

A. No. 7 dwarf.

Q. Where is that?

A. It is at Tower 55.

Q. What color did that show?

A. It showed purple when I left it.

Q. That day?

A. Yes, sir, it did.

Q. What other dwarf did you handle that day?

A. The dwarf at Tower 57.

Q. What did that dwarf show?

A. That dwarf there showed purple in the morning.

Q. What other dwarf did you handle that day?

A. Oh, several signals that I have to handle.

892 Q. Tell us which ones? You have got this wonderful memory.

A. It ain't necessary to be remembered at all.

Q. Now, you see if you can remember some of the others.

A. I would under certain conditions.

Q. Can you remember any of the others?

A. I just told you.

Q. Can you?

A. Yes, sir, I can.

Q. Tell us some of the others then.

A. I just told you, I say.

Q. Tell us some more.

A. Under certain conditions——

Q. Tell us some more, Mr. Kells.

A. I could tell you, under certain conditions. If anything happened I could tell you all about it.

Q. My question was what the position of the lights was in some of the other dwarfs. You have told us two. Tell us some more.

Mr. Spratt: I object to that. The witness has said under certain conditions he could remember some more.

The Court: This is cross examination.

Mr. Spratt: There must be a limit to it.

The Court: He has a perfect right to ask that.

Q. Now, if you will please answer my question. What other dwarfs can you remember that morning?

A. Under certain conditions.

The Court: If the witness can't answer, doesn't know, he can say so.

893 Q. Can you tell us what the signals were on any other dwarf that day except the three you have told me?

A. It isn't necessary exactly to——

Q. Can you or can't you?

A. Under certain conditions. I don't know as I could, because I didn't pay any attention. There was nothing happened to them. I could have told you the next day.

Q. Can you tell me what the condition of this dwarf was the day before?

A. At that time——

Q. The day before.

A. I am quite sure that that dwarf there at that time when I lit it and put it on was purple, was in normal position.

Q. This was on the 12th of October this accident happened, wasn't it?

A. Yes, sir.

Q. You lit that dwarf on the 11th, didn't you, the day before?

A. Yes, sir, I did.

Q. What did it show then?

A. I will swear to it that that showed purple at that time.

Q. And you lit it on the 10th, didn't you?

A. Yes, sir.

Q. What did it show then?

A. If you want me to go back and relate from the time I started——

Q. I just want you to answer my question.

Mr. Spratt: He has a right to make his explanation there, your Honor.

894 Mr. Ward: He has, when you want him to. I am asking a direct question now.

Mr. Spratt: If the court please, the point I took was that he was trying to answer and he was stopped.

The Court: He has no right to explain. He has no right to answer something else. That can be called to his attention on a further direct examination.

Q. What was the position of that light on the 10th?

A. I could tell you under certain conditions.

Q. What was the position of that light on the 9th?

A. On the 9th? If there was anything happened under that condition I could tell you.

Q. Can you tell what the condition of that light was on the 9th?

A. No, I can't.

Q. Can't you tell what it was on the 10th?

A. Yes, sir, I told you under certain conditions——
Q. What was it on the 10th, or don't you know? Can you answer e question, Mr. Kells?
A. I answered all I am going to. I told you under conditions if mething happened——
Q. Do you know what it was on the 10th or don't you?

The Court: Listen to me. I am going to tell you what you have t to do. You have got to answer these questions. In the first nce, if you don't know say: "I don't know".

The Witness: I just said I don't know.

The Court: Don't answer your way and say it is the only way you are going to answer, and all that, because we won't ve that in this court. Repeat the question.

(Question read.)

The Court: You can say "I don't know" if you want to.

A. I couldn't swear to it at that time.

By Mr. Ward:

Q. Do you know what it was on the 11th?
A. I told you I couldn't swear to every day——
Q. Do you know what it was on the 11th, the day before this cident?
A. I couldn't swear to it at all.
Q. Didn't you swear here a minute ago when I asked you the ne question, that it was purple?
A. I say if it is there I said so.
Q. Do you know what it was on the 13th?
A. There was nothing extraordinary happened, and I don't re-mber.
Q. Do you know what it was on the 13th?

The Court: Just say whether you do or not. If you do say yes if you don't say "I don't".

A. Why, no, I couldn't. I didn't keep no record.
Q. When you filled that lamp and lighted it on the 12th you n't know there was any accident going to happen, did you?
A. No, sir, I didn't.
Q. You didn't charge your mind any more with the position of any other lamp on that circuit at the time when you filled it?

A. I could have told you the next day.

Q. Just answer my question. Did you charge your mind more with the condition of — lamp than you did with the con-n of any other lamp on your circuit?
A. Why, no, I didn't.
Q. How many lamps did you have to fill?
A. My lamps is something over 50 lamps.
Q. Do you mean to tell this jury that you could swear positively position of each of those 50 lamps the next morning?

A. The next morning?
Q. The next morning?
A. I could tell you what I done yesterday.
Q. Could you tell the position of each one of those 50 lamps the next morning?
A. I could if anything happened that I had to.
Q. If you had to?
A. Yes, sir.
Q. You filled the lamps yesterday, didn't you?
A. No, sir, I didn't.
Q. Don't you do that any more?
A. Once in awhile I do.
Q. When is the last time you did it?
A. When it the last time I done it?
Q. Yes.
A. A week ago last Thursday.
Q. How many lamps did you fill then?
A. I filled 60 lamps.
Q. Now, your business when you are filling lamps is to fill the lamps and see if everything looks all right around the lamp at that time, isn't it?
897 A. Yes, sir.
Q. You don't have to operate the signals, do you?
A. My work ain't operating. it is maintainer.
Q. You don't operate then, do you?
A. No, sir.
Q. You don't have anything to do with the train movements, have you?
A. No, sir, I haven't got nothing to do with operating the signals.
Q. When you go to a signal and everything looks all right to you, what difference does it make to you what color it shows? Does it make any?
A. Under certain conditions it does, yes.
Q. Does it make any difference to you what color it shows if everything looks all right there?
A. It is up to a man to see how things is when you are working on a signal.
Q. But you haven't got anything to do with setting them green or purple, have you?
A. No, I haven't.
Q. That is for somebody else?
A. Yes, sir.
Q. So that when you go there your business is to clean the lamp and light it, isn't it?
A. Yes, sir.
Q. Do you think the next moring you could have testified truthfully and accurately about the position of every one of those 50 lights that you had filled the night before?
A. Yes, sir, I could.
Q. You could have sworn to it?

A. Yes, sir.
Q. And would have been willing to?
A. Yes, sir.
Q. Have you got any idea, Mr. Kells, why you weren't asked give this information that you have for the first eight years that litigation has been going on? Do you know why they didn't ar you the first three trials?
A. I couldn't say anything about it. I don't know.
Q. Did you make a statement after this accident telling what the ition of that light was when you lit it?
A. I was called up to Mr. Spratt's office.
Q. Did you make a statement?
A. Yes, sir, I did.
Q. And did you say in that statement what the position of that it was?
A. Yes, sir, I did.

Mr. Ward: I have subpœnaed that statement. I would like to e that statement.
Mr. Spratt: Was there any written statement?

A. No, sir, there wasn't.
Q. Mr. Kells, haven't you stated within the last few days that reason you remembered that was because you put it down in k and white?
A. No, sir, I didn't.
Q. You didn't?
A. No, sir.
Q. You didn't make a written statement about it?
A. No, sir, not to the New York Central people.
Q. Did you make a written statement to anybody about it?
A. No, sir, I didn't.
Who did you make the written statement to, and sign it, that mentioned to me here a moment ago before Mr. Spratt interrupted ?
I didn't make it to nobody.
Didn't you just say here that you made and signed one, right e presence of this jury here within five minutes?
No, sir.

Mr. Spratt: He said he made a statement.
Didn't you say you made a statement——
Mr. Ward: Just run back. I may be wrong about it.
(The stenographer read from his minutes as requested).
Mr. Ward: I am glad I had you read it, because my recollection wrong.

If you didn't make a written statement who did you tell that

Who did I tell that to?
Yes, sir, in Mr. Spratt's office?
I couldn't swear who I told it to.
Was it to Mr. Spratt?

A. I couldn't tell you. I was only in there just for a very few minutes. I couldn't swear. It is a long time ago exactly.

Q. Do you know that gentleman over there, Mr. Powell, sitting next to the officer (indicating)?

A. No, sir.

Q. A gentleman that helped try the first three trials?

900 A. I couldn't swear to him at all.

Q. Did you tell him?

A. No, sir, I don't know anything about it. It might have been, but I couldn't swear to it.

Q. Do you know Mr. Hugh Rourke, who was connected with that office?

A. No, sir, I don't know the man at all.

Q. They had you up there, didn't they?

A. I was only in there for about 5 or 10 minutes.

Q. Did they have you up to court?

A. No, sir, I wasn't in the court house even.

Q. You say you told somebody connected with that law office that you put that signal at purple at half-past 3 on the 12th of October?

A. I didn't say I put it to purple. I said it was at purple when I left it.

Q. You told them just as positively as you have come into court here ten years after and told it?

A. Yes, sir.

Q. They never swore you, did they?

A. I was never here on the stand.

Q. They never swore you?

A. No, sir.

Q. And somebody came down and got you two years ago, didn't they?

A. Yes, sir.

Q. And brought you up, and you swore to what you have sworn to here?

A. Yes, sir.

Q. After eight years?

A. Yes, sir.

Q. Did you tell Mr. McGrath in my office, who interviewed

901 you in company with the Chief of Police of Tonawanda in the last two weeks, did you tell him the reason you remembered this was that you set it down in black and white?

A. I said——

Q. Did you?

A. Yes, sir, I says at this time I remembered little things through setting them down sometimes in little notes.

Q. Did you tell Mr. McGrath in company with the Chief of Police, who called on you within the last two weeks, that the reason you remembered this and were able to testify to it was because you put it down in black and white? Is that what you told Mr. McGrath?

A. I told him I made little statements sometimes to remember those things.

Q. You told him you put this down in black and white and that is the reason you remembered it?

A. I don't know as I told him that particular case.

Q. Didn't Mr. McGrath ask you how you could truthfully state something about the position of one light out of 50 after eight years? Didn't he ask you that?

A. I told him if he wanted any information to go up to court.

The Court: Just answer his questions.

Q. Didn't Mr. McGrath ask you how you could remember after eight years about one of 50 lights? He asked you that, didn't he?

A. I just forget.

Q. And didn't you tell Mr. McGrath that you remembered
902 it because you had put it down in black and white?

A. I couldn't say as I said it in that way.

Q. Didn't you tell him that you put it down?

A. No, sir, I never told him I put it down. I told him I sometimes make notes of things.

Q. Did you make a note of this?

A. I did at that time, but I couldn't——

Q. Did you make a note of this?

A. I did at that time, a little note of it.

Q. Where is the note?

A. I couldn't replace it just at present.

Q. That has gone too?

A. I didn't take very much care of it.

Q. Why did you make a note of it?

A. Well, lots of times with certain conditions, if anything out of the ordinary happens, it sometimes helps a man to refer back.

Q. It is your duty to make a report of anything wrong, is it?

A. If I see anything wrong it is.

Q. Did you make any report about this tower?

A. Report?

Q. Yes.

A. No, I didn't.

Q. Did you make any report to your signal superior in your course of duty afterwards or the next day, after you heard of this accident, that this tower was all right that night, and that it was purple?

A. I heard that there was a report.

Q. Did you make one?

A. No, sir, I didn't.

903 Q. When did you make this note of the position of this tower that you can't find now?

A. The next day.

Q. Where were you when you made it?

A. I was just home at night. I just took a little sketch of it.

Q. Put it down?

A. I can remember it though just as well as can be.

Q. Your memory was clear about it then?

A. Yes, sir, it was.

Q. So that you made a note about it then?

A. Yes, sir.

Q. I asked you that same thing when you appeared here for the first time two years ago, did I? Do you remember my asking you?

A. Yes, sir.

Q. Do you remember what you told that jury, page 771? Do you see this question that I asked you (showing testimony to witness): "Q. Please answer my questions, Mr. Kells. Did you make any note of it?" I read that right, didn't I?

A. Yes, sir.

Q. Do you see what your answer was? "Q. Do you put it down in writing?" And did you answer: "No, sir, I don't?"

A. All right, sir.

Q. Is that what you swore to before?

A. It must be true if I said it, but I——

Q. Was it true that you made a note of it as you told us now? Or is it true that you didn't, as you told us two years ago?

A. I am quite——

904 Mr. Spratt: Read the whole of the answer just before that.

Q. Which is true, did you put it down in writing or didn't you? Which way do you want it now?

A. Why, I couldn't furnish the writing so that——

Q. Did you put it down in writing or didn't you?

A. I made a little note of it I am quite sure.

Q. Did you tell us two years ago that you didn't?

A. I told you that is what I said, so that it must be true.

Q. At one time or the other you told us a falsehood, didn't you?

Mr. Spratt: I object to that as improper.

The Court: He may ask him, under the circumstances.

Mr. Spratt: Counsel has got quite handy with the use of the word "falsehood".

Mr. Ward: I have got to in this lawsuit.

The Court: You may call it something else—mistake.

Q. At one time or other you didn't tell the truth, did you, Mr. Kells?

Mr. Spratt: I object to that.

A. It looks that way.

Q. But you are telling the truth about the lantern, aren't you?

A. Yes, sir, I am.

Q. And during the first three trials of this case, when we were discussing this same question, you were right down in Tonawanda, weren't you?

905 A. Yes, sir, I was.

Q. Right where you could be brought up to court?

A. Yes, sir.

Q. Now, your light is a white lantern, isn't it, that goes in these dwarfs?

A. Yes, sir.

Q. It is a white lantern?

A. It shows white.

Q. And the lantern don't move when they operate the dwarf, does it? The lantern stands still.

A. Yes, sir.

Q. But there are two little round discs, one has got green glass, and the other has got purple glass in? That is right, isn't it?

A. Yes, sir, it is.

Q. And sometimes the green glass will be in front of the lantern and then it will shine green, and sometimes the purple glass will be in front and it will shine purple? That is the way that thing works, isn't it?

A. Yes, sir, the condition that it is pulled in.

Q. Depending on how it is pulled in?

A. Yes, sir.

Q. So that you set the lamp in the same place whether it shows green or whether it shows purple?

A. Why, there is nothing to stop a man.

Q. You put the same lamp in?

A. If everything is right.

Q. You put the same lamp in, don't you?

A. Yes, sir.

Q. You do just exactly the same thing? Whether it showed green or whether it showed purple?

906 A. There is nothing to stop a man.

Q. You do just exactly the same thing whether it showed green or whether it showed purple?

A. Yes, sir, I would.

Mr. Ward: All right.

Redirect examination.

By Mr. Spratt:

Q. Now, Mr. Kells, were you asked to make a report to the company of this?

A. Why, I was called—I was asked to come up to Mr. Spratt's office.

Q. When was that?

A. That was during the first trial, if I am not mistaken, in 1910.

Q. Did you come to the office?

A. Yes, sir, I did.

Q. And you had an interview with somebody there?

A. Yes, sir, I did.

Q. What did you tell them?

Mr. Ward: I object to that as incompetent.

Q. Did you tell them what you knew about the accident as you have told here?

A. Yes, sir, I did. They asked me about the lamp and the way I left it, and I told them.

Q. And the trial was going on then, as you understood it?
A. Yes, sir.
Q. The man that talked with you, had you ever known him before?
A. No, sir, I didn't.
Q. Did he tell you who he was?
907 A. He said he was one of the attorneys for Mr. Spratt.
Q. After you told him your story what did he say to you?
A. Why, he told me if he wanted me he would call me up.
Q. Were you ever called——
A. No, sir, I wasn't.
Q. Until——
A. Until the last two trials.
Q. The last two trials you were asked to come up by Mr. Hollister, were you?
A. Yes, sir.
Q. It was a verbal statement, was it, you made?
A. He asked me the questions.
Q. You don't recognize Mr. Powell here, you say?
A. No, sir.
Q. Or Mr. Rourke?
A. I couldn't pick the man out if I wanted to. I don't know the man at all.
Q. Counsel has asked you about the condition of your lamps at other times. State whether there was anything impressed—whether it impressed it on your mind about the condition of the lamp in question?
A. Why, if there had been anything out of the ordinary conditions, I would have remembered things. There is certain things that a person could remember if conditions isn't right. An accident of this sort, a person would bring everything reflected right
908 as plain as day to a person. There is certain things—if wrecks occur or signals, or a person got killed at a certain spot, there would be something wrong with him if he couldn't remember a certain amount about it.
Q. You heard of the accident, you say, to Mr. Kinney the next morning?
A. Yes, sir.
Q. State whether that impressed anything on your mind?
A. Why, it certainly did, and under the condition that I was filling the lamp it was up to me—I felt as though to be sure that everything was right when I left it, and at that time I could remember as plain as a person could remember how I left things.
Q. How you left it the previous evening?
A. Yes, sir, I could.
Q. Do you know why you weren't called up for the previous trials?
A. No, sir, I don't know anything about it. I couldn't tell you.
Q. You simply came when you were directed to come?
A. Yes, sir.
Q. In your opinion was there any necessity for you making a written report to the company?

Mr. Ward: I object to that. Incompetent and immaterial what his opinion was on the subject.

A. No, I don't think there was.

Q. For that reason did you not make any written report?

A. No, I didn't make any written report. I heard there
909 was an accident report made out, N. W. 33.

Q. Do you know who made that?

A. I think Dougherty, if I ain't mistaken.

Q. Were you ready to make a report if one was asked you?

A. Yes, sir, I was.

Q. There was some talk here about a memorandum. Did you make a memorandum of your——

A. Why, I am quite sure that I did, just a little bit of a sketch. It didn't amount to much.

Q. Was that for the company?

A. No, just for myself. Just a little thing that I—but it has got mislaid some place.

Q. That was made when, how long after the accident?

A. Why, the next day if I ain't mistaken.

Q. Mr. Ward said that some man from his office, named McGrath, and the Chief of Police came to your house. When did they come to your house?

A. I am quite sure it was January 18th. There was two men. I couldn't say as it was Mr. McGrath. I know Mr. Elliot, but I couldn't say who the other gentleman was. It was in the evening about 7.30.

Q. Did they try to force you to make a statement or change your testimony?

A. He talked as though he would like to inquire around and talk, but I didn't have time. I was busy, and so I came up there to talk with him. I directed them up here, may be he could get a statement up here.

910 Q. Do you know any reason why the Chief of Police, a city official, should be called upon to call on you on behalf of Mr. Ward, and neglect his city duties?

Mr. Ward: May be it was a part of his duty.

Mr. Spratt: I am asking the question. If it is his duty to be your runner and browbeater may be it is so.

Mr. Ward: Nobody has suggested any browbeating, Mr. Spratt.

The Court: We will proceed in regular order.

(Question read.)

A. No, sir, I don't.

Mr. Spratt: Is Mr. McGrath a policeman too, Mr. Ward?

Mr. Ward: You had better swear him.

Mr. Spratt: I am just inquiring.

Mr. Ward: If I said something to you that I ought to say I would be violating the same rule which you just violated.

Mr. Spratt: I may want to call Mr. McGrath.

The Court: If you do call him. Don't have a lot of altercations here.

Juror No. 9: Does the jury have a right to ask questions?

The Court: Yes, if they are proper questions.

By Juror No. 9:

Q. Was it your duty to light those lamps in the afternoon?

911 A. Yes, sir.

Q. Was it a part of your duty to observe the color of the signal in the glass, in the different lights?

A. Yes, sir, it was my duty to observe and take care, see that the lights of glass was in. It was my duty as much as it was to fill the lamps——

Q. Was the glass always at one color in the afternoon?

A. Why, not exactly. If it would happen to be—something was coming at that time it would be up to a man, he should notice it.

Q. So that the glass might be either red or green at the time you lit the lamp and left it? It might be any one of those colors?

Mr. Spratt: Purple or green.

A. Purple or green. It is up to a man to take notice to see that your glass is in the dwarf when you light a lamp, that it is in—see that everything is in good condition. See that your wires—just as important to see that——

The Court: Now you are going beyond the answer to the question. That is all.

Mr. Spratt: I don't know if I am proper or not, your Honor, but I wanted to say that if any of the jurymen would like to have this machine taken apart to see how it works Mr. Newman will do that. They can see how it operates, they can see the movement of the bars and the levers as they are worked.

Mr. Ward: There has never been any question raised by

912 the plaintiff about the machine.

The Court: No jurors have asked for that, as far as I know, and you don't care to present it without they do ask?

Mr. Spratt: I simply wanted to show them all there was in it.

FRANK M. CRAVEN, was duly sworn as a witness in behalf of the defendant:

Direct examination.

By Mr. Spratt:

Q. Mr. Craven, where do you live?

A. I live at Buffalo, N. Y.

Q. What is your occupation?

A. I am a locomotive engineer.

Q. On what railroad?

A. Lehigh Valley.

Q. How long have you been a locomotive engineer?

A. About 21 years.

Q. Have you had anything to do with the question of signals, been on any committee?

A. I didn't get the question.

Q. Have you been on any committee of your road with reference to signals or anything of that kind?

A. No, sir.

Q. Mr. Craven, is there a universal rule on the railroads of this country with reference to the signals, the kind of signals, for
913 instance, to come ahead and stop?

A. Yes, sir.

Q. Which is used on all roads the same?

A. As far as I know.

Q. What is a stop signal?

A. Why, it is a horizontal signal generally.

Q. Did you see Mr. Mullen on the stand and also Mr. Boyle?

A. I did, yes, sir.

Q. Did you see them give the stop signal?

A. I did.

Q. State whether that is the stop signal that is used upon railroads? Was it proper?

A. It is.

Q. Did you see them show the come-ahead signal?

A. I did.

Q. State whether that is the proper signal and the one used in railroading?

The Court: Isn't this provided for in your rules? Didn't you have a book here with pictures in it?

Mr. Spratt: Yes, sir. He is an expert, and I am going to finally reach the point——

The Court: The question would be whether they were observing their own rules, the rules of this railroad, wouldn't it? Not what some other road might——

Mr. Spratt: He says the rules are the same on all the roads.

The Court: All right.

Q. Are the rules the same on the New York Central as they are on the Lehigh Valley?

914 A. Absolutely the same.

Q. And on the Erie?

A. Yes, sir.

Mr. Ward: How does he know? He has simply run on one road.

The Witness: Because I run over the New York Central.

Mr. Ward: Engineer?

The Witness: Yes, sir.

Q. You run over the New York Central between what points?

A. Between Tonawanda Junction and Niagara Falls, Suspension Bridge.

Q. And the same rules in use?

A. The same rules in effect.

Q. State whether that is the proper signal and the one used in railroading?

A. It is.

Q. Now, Mr. Craven, if a signal were given starting from the shoulder, or near the shoulder, and swung down across the front, what kind of a signal would that be? In front, I mean, so that part of the signal disappears.

A. That would be a stop signal.

Q. Mr. Craven, what is the rule with reference to an engineer approaching a dwarf and before passing it?

Mr. Ward: Just a moment, your Honor. This is going too far, to ask a Lehigh engineer what the question of proper practice is on the New York Central, which has been testified to here by New York Central employees.

915 (Question read.)

Mr. Spratt: I will withdraw that and ask this——

Q. You run on the New York Central, do you?

A. Yes, sir.

Q. Where there are dwarfs?

A. Oh, yes.

Q. And signals?

A. Signals.

Q. And state whether the rule with reference to observing and passing dwarfs is the same on all the railroads of the United States?

Mr. Ward: I object to that. The witness not qualified to answer. This is a question of proper practice on the New York Central.

The Court: This is a big country with a great many railroads in it. If you ask him if it is the same on all railroads of the United States——

Mr. Spratt: Strike that out.

Q. Do you know what railroads there is a universal practice on?

A. I am perfectly familiar with the Lehigh Valley and New York Central because I have operated trains over both those roads.

Q. What is the rule with reference to engineers observing signals, especially dwarf signals before passing?

Mr. Ward: I object to that as incompetent and immaterial. The rule itself is the best evidence.

916 The Court: That is on the New York Central?

Mr. Spratt: That is on the New York Central.

Mr. Ward: This man says he runs over the New York Central tracks, and he probably is a Lehigh engineer with a Lehigh crew.

The Court: Isn't this all a matter of printed rules? Haven't we had them read here?

Mr. Spratt: We have had them construed. He produced Mr. Peck here, who as an expert witness testified concerning all those things, from an expert's point of view. He was produced as an expert, as your Honor will recall. He was permitted to testify.

The Court: As to practice under the rules?
Mr. Spratt: Yes.
The Court: And that is what you are seeking to show here now?
Mr. Spratt: Yes, sir.
The Court: What was the practice in the application of the rule?
Mr. Spratt: Yes.
The Court: He may answer, and I will give Mr. Ward the exception.

A. The engineer must know that he has a signal before he passes it.

Q. State what would be the practice in case his view was obstructed by steam so that he couldn't see the dwarf when he reached it.

917 Mr. Ward: I object to that on the ground that it doesn't appear there was any practice on the subject. It was such a frequent thing that steam leaks from their engines and obscures the view of signals——

Mr. Spratt: I object to the counsel's statement. He has a right to object but not to lecture.

Mr. Ward: It ought to be proved, but there is no such practice as that proved.

The Court: We don't want any lecturing. We just want objections. I will allow the question and give you an exception.

Mr. Ward: Exception.

A. Why, it would not be safe to pass a signal that was obscured from the vision by steam.

Q. State whether it is the duty of an engineer to observe the signals, for instance, at a dwarf, as well as observing the signals of a trainman at the same time, who might be giving him signals at the same time.

A. Yes, sir, it is.

Q. What is the practice, Mr. Craven, supposing an engineer gets, for instance, a green light when he is four or five hundred feet away from the dwarf, has the towerman the right to take that signal away from him?

A. The towerman has that right, yes, sir. It isn't supposed that he will do that, except in the case of an emergency to prevent an accident.

Q. State whether it is the practice of the engineer to ob-
918 serve the signal from time to time to see whether it still holds good for him?

A. That is just the reason why the engineer should know whether he has a signal when he passes it or not.

Mr. Spratt: You may examine.

Cross-examination.

By Mr. Ward:

Q. Just two or three questions, Mr .Craven. Did you ever work for the New York Central?

A. Not for the New York Central, no, sir.

Q. So that your experience on the New York Central is when you are running over that little section of track between where——

A. Tonawanda Junction and Suspension Bridge.

Q. That the Lehigh uses?

A. Yes, sir.

Q. And you are running over it with your Lehigh trains?

A. Yes, sir.

Q. How did you happen to get up here in this law suit?

A. I was sent up here by my operating official.

Q. Who sent you?

A. The superintendent.

Q. The superintendent of the Lehigh?

A. Yes, sir.

Mr. Spratt: I requested him to send me a man.

Q. Who picked you out?

A. I was notified by our local officials.

919 Q. Just an order that you got?

A. Yes, sir.

Q. Who is paying you now while you are up here?

A. I don't know. I haven't considered that.

Q. You expect to be paid, don't you?

A. I certainly do expect to be paid.

Q. They took you off your run, I suppose, to send you up here?

A. Yes, sir.

Q. Now, of course, Mr. Craven, there are lots of movements that an engineer has to make when he can't see the dwarf signal, and doesn't see it at all, aren't there, and he has got to rely on somebody else?

A. Not around an interlocking plant, he hasn't.

Q. He must absolutely know so far as he can rely upon his eyesight or upon signals that he gets from somebody else, isn't that so?

A. The signal that he gets from somebody else, as I have already stated, he will take, if he has confidence that the man knows his business, or is able to judge.

Q. You frequently push a long train around a curve, don't you?

A. Yes, sir.

Q. The front end of your train gets to the dwarf where you can't see it?

A. Yes, sir.

Q. Then you have to take the signals of the man on top, don't you?

A. Yes, sir.

920 Redirect examination.

By Mr. Spratt:

Q. Under those conditions you say you want to know the man who is giving you the signals?

A. Yes, sir.

Q. Whether you could rely on him?
A. Just exactly.
Q. If he was a strange man to you what would you do?
A. A new man, and I felt that he was not competent, or didn't know the signals, I certainly wouldn't take them.

Mr. Ward: You don't have any incompetent men, do you?

By Mr. Ward:

Q. Supposing you are backing up an engine, and you are on the left side, then you have to take the signal from the fireman or the head end brakeman?
A. That is up to the judgment of the engineer whether he takes that signal or not.
Q. They do take it right along every day, don't they?
A. It has been done, yes, sir.
Q. Every day?
A. Yes, sir.
Q. And you do it?
A. I do it if I am familiar with the men I am working with and feel they are competent to give the signal. Otherwise I inform myself by seeing the signal.
Q. If you feel justified that that man knows his business,
921 you frequently have to take the indications of the signal from your fireman or brakeman?
A. Yes, sir.
Q. That is so in all railroad practice, isn't it?
A. Yes, sir.
Q. And an engineer can't do the whole business and perform everybody else's duty besides performing his own, can he?
A. Very often he is required to perform the duty that should devolve upon other members of the crew.
Q. He is supposed to be as careful as he can be?
A. He must absolutely know.

Mr. Spratt: Just wait a minute.
Mr. Ward: I thought you were through.

By Mr. Spratt:

Q. In case there was any doubt about the kind of a signal that a man was giving you, what would be your duty and practice under those conditions?
A. The rule absolutely requires us to stop.

Mr. Ward: We concede that. There is no dispute between any of us on that point, Mr. Spratt.

Q. Assuming that an engineer could not see the dwarf signal on account of the steam, and is in doubt as to the kind of signal that was given by the man at the head end of the caboose, what would be his duty under such circumstances, before passing the dwarf?

922 Mr. Ward: That is wholly immaterial. That is not the issue here. Everybody agrees he should stop under those circumstances.

Mr. Spratt: I think he has a right to object, but not to lecture.

The Court: Yes, we don't want anything but objections and rulings. Then we will go along smoothly and with no altercations.

Q. Will you answer that?
A. The engineer would stop.

By Mr. Ward:

Q. What are the colors for dwarfs on the Lehigh?
A. They are yellow and purple.
Q. And what does yellow mean?
A. The yellow is the clear signal.
Q. Yellow and purple?
A. Yes, sir.

Mr. Ward: That is all.

(Recess until 2 o'clock p. m.)

After Recess—2 o'clock p. m.

HARVEY J. LESTER, was duly sworn as a witness in behalf of the defendant:

Direct examination.

By Mr. Spratt:

Q. Mr. Lester, you live in Buffalo?
A. Hornell, N. Y.
923 Q. You are in the employ of the Erie Railroad Company?
A. Yes, sir, as an engineer, locomotive engineer.
Q. How many years have you been a locomotive engineer?
A. 26.
Q. Are you familiar with the yard of the New York Central here in question?
A. No, sir.
Q. The Erie tracks run parallel with the Belt Line tracks there, do they not?
A. Yes, sir.
Q. And cross them in a couple of places there?
A. Yes, sir.
Q. Have you run over those tracks?
A. Yes, sir.
Q. Frequently?
A. Yes, sir.
Q. Do you know whether the rules of the New York Central and the Erie, with reference to giving signals, are the same?
A. No, sir.

Q. You don't know?
A. No, sir.
Q. Have I shown you the book of rules of the New York Central?
A. Yes, sir.
Q. Showing the hand signals?
A. Yes, sir.
Q. State whether or not they are the same on the Erie?
924 A. They are.
Q. In your 26 years' experience have you had a good deal of practice in the taking of signals?
A. Yes, sir.
Q. From brakemen on cabooses in front of engines?
A. Yes, sir.
Q. And trains?
A. Trains.
Q. Did you see the come-ahead signal given in court by Mr. Mullen and also Mr. Boyle?
A. Yes, sir.
Q. State whether that is the proper come-ahead signal?
A. Yes, sir, it was the proper signal, come-ahead signal.
Q. Did you see the signal given by those two men, also, for stopping?
A. Yes, sir.
Q. And state whether that was the proper signal?
A. I consider that the proper signal.
Q. Where a signal, starting from the shoulder and swinging in an arc across the body, what would you say that signal was?
A. That was a stop signal.
Q. And assuming that in the lower part of the swing it disappeared around the end of the caboose, or across the body of the brakeman, what signal would you say that was?
A. I would consider that was a stop signal.
Q. The come-ahead signal, all the time in giving that is it proper to have it in sight?

925 Mr. Ward: If I may be permitted, Mr. Lester very frankly tells us he is not familiar with the New York Central practice. He is now expressing an opinion on the New York Central practice. I object to that.

The Court: He has already testified that the signals he has seen given in court are certain signals. I think that is as far as he can go.

Mr. Ward: Of course I don't object to that.

Mr. Spratt: Exception.

Mr. Ward: There is nothing in the book of rules about that, and Mr. Lester says he is not familiar with the New York Central practice, only what he has seen in the book of rules.

The Court: You object?

Mr. Ward: Yes.

The Court: Objection sustained.

Mr. Spratt: Exception.

Q. Mr. Lester, after an engineer once sees, for instance, a dwarf four or five hundred feet away from him to be set at clear or green, has the towerman a right to take that away from him?

Mr. Ward: This also involves the question of New York Central practice. I object on the same grounds.

The Court: Do you know anything about that, that he has just been asking you?

A. Me?

926 The Court: Yes, about the New York Central Railroad's practices?

A. No, I do not.

The Court: Then I will sustain the objection.

Mr. Spratt: The court will give me an exception?

The Court: Yes, surely.

Q. Now, Mr. Lester, may a dwarf signal be taken away from an engineer by the towerman before he reaches it?

A. Yes, sir.

Mr. Ward: That is the same objection. It is the same question only put in a different form.

The Court: Yes. In giving your answer would it relate to the New York Central or to the Erie?

A. Well, they are a standard code of signals now. They are all alike.

The Court: For all railroads, both the Erie and New York Central?

A. Yes, both the Erie and New York Central.

Mr. Ward: This doesn't relate to signals, this question of Mr. Spratt's. It is the practice.

The Court: When one signal has been given, taking that away and giving another one?

Mr. Ward: Yes.

Mr. Spratt: Under the rules.

Mr. Ward: There are not any rules on this subject except the——

927 The Court: It is a custom or practice.

Mr. Ward: Mr. Lester has said he is not familiar with New York Central practice. It seems to me there must be plenty of New York Central employees who know about New York Central practices, without asking a gentleman from the Erie to testify about New York Central practices.

Mr. Spratt: There are plenty, but I was trying to get disinterested men from other roads who knew the rules. They are universal, I understand. The same everywhere.

The Court: I understood him to say he did not know the rules as to the New York Central, the practices.

Mr. Spratt: He said they were universal.

Mr. Ward: Oh, no, Mr. Spratt.

The Court: He has since said that, yes. What do you say on

that subject? Do you say the practice on a question like this is the same on all the roads?

The Witness: They are the same on all the roads.

The Court: You know that to be the case, do you?

The Witness: Yes, sir.

Mr. Ward: What we are discussing is 12 years ago.

The Court: Well, I will let him answer.

Mr. Ward: May I ask a preliminary question?

The Court: Yes, certainly.

928 By Mr. Ward:

Q. Mr. Lester, do you know anything about the practices of the New York Central Railroad 12 years ago?

A. No, sir.

Q. I suppose the things that are not written down in the book of rules, and the sort of customs grow up among the men themselves, don't they, the way of doing business?

A. Well, some men, yes.

Q. It might be different in one place than in another?

A. Yes, sir.

Q. And it might be different on one road than on another? Isn't that so?

A. The rules are the same, but the custom is different.

Q. What you refer to as being universal is the actual written rules? That is what you refer to?

A. Yes, sir.

Q. The practice that is adopted under those rules varies in different places with different railroads? Isn't that so?

A. They do.

Q. And at different times on the same railroad?

A. Yes, sir, they do on the same railroad.

Q. You do things, for instance, different on the Erie than you did 12 years ago, in many respects?

A. But they are violating the rules when they did that.

929 Mr. Ward: The question related to practice and custom. I submit Mr. Lester ought not to be testifying about that.

The Court: He says he does not know anything about the practice on the New York Central at this time. That is the way I understand his answer.

By the Court:

Q. Isn't that so?

A. On the New York Central?

Q. Yes.

A. I admit that I didn't know——

Q. In 1908?

A. No, I didn't know anything about the rules——

Q. The practice under the rules?

A. The practice under the rules.

The Court: Of course we know what the rules are. We have got those in evidence. So that I do not see how this is going to help at all. I will sustain the objection.

Mr. Spratt: The court will give me an exception. That is all, Mr. Lester.

Cross-examination.

By Mr. Ward:

Q. Did you come up from Hornell on purpose for this?

A. No, sir.

Mr. Spratt: I offer in evidence the original summons and complaint and the answer to the original complaint, under con-
930 sent of counsel that the printed form of the summons and complaint and answer be used in place of the original.

The Court: Received without objection.

Mr. Spratt: It is pages from the appeal book of the second trial, received in evidence and marked Exhibits 7 to 10 inclusive. I offer the amended complaint, verified June 24, 1909, and the amended answer to the amended complaint, verified February 22, 1917, received in evidence and marked Exhibit 10 and Exhibit 11, respectively. It was stipulated that the service was duly made of these pleadings that are offered in evidence.

Mr. Ward: I stipulate it.

The Court: What is the difference between the two complaints?

Mr. Spratt: One was under the State Law and one was under the Federal.

The Court: What is the difference in the way they read? What allegation, except the one allegation, has been added with reference to Interstate Commerce?

Mr. Ward: No other, except that the amount of damages, which were originally demanded has been increased.

The Court: There are no other allegations of fact, are there?

Mr. Spratt: Not that I recall.

Mr. Ward: Only that the amount of damages was increased.

931 Mr. Spratt: I make a motion to strike out the testimony of the witnesses Carroll, McMurray, Cunningham and Sullivan, relating to the repair on engine 2499, on the ground that such items as were testified to by these witnesses cannot properly be considered as evidence of any actual negligence on the part of the defendant in this case.

The Court: Motion denied.

Mr. Spratt: Exception.

I move to strike out the testimony pertaining to the character of the contents, the source and the destination of the cars on the fence track, which were to have been taken to East Buffalo by the plaintiff, on the following grounds:

(1) That in the absence of any evidence as to their contents, source or destination, it would be a matter of mere speculation for the jury to attempt to determine such questions.

(2) That the submission as to whether the plaintiff was engaged in interstate commerce at the time of the accident is outlawed under the Statute of Limitations as pleaded in defendant's amended answer; and

(3) That when the accident occurred the plaintiff was not engaged in interstate commerce, as he was making an independent movement with his engine at the time of the accident, which
932 was not necessitated by the orders pertaining to the handling of those cars.

The Court: The motion is denied. I intend to submit to the jury the question of whether or not the plaintiff and the defendant in the movement at this time were acting in interstate commerce, whether or not this was an act of interstate commerce.

Mr. Spratt: Exception. The defendant rests.

Mr. Ward: I would like to swear Mr. Spratt.

MAURICE C. SPRATT, was duly sworn as a witness in rebuttal on behalf of the plaintiff:

Direct examination.

By Mr. Ward:

Q. Mr. Spratt, you were a member of the firm of Hoyt & Spratt, who put in the original answer in this action?

A. Yes, sir.

Q. And you have continued to be connected with that firm until you formed a partnership with Mr. Locke and Mr. Babcock and Mr. Hollister?

A. Yes, sir.

Q. And since that time your firm has been known as Locke, Babcock, Spratt & Hollister?

A. Yes, sir.

Q. This action has been in the charge of your firm from the beginning?

933 A. Yes, sir.

Q. Did you have any knowledge of the facts stated by the witness Kells here upon the first, second or third trial of this action?

A. No, sir, I had nothing to do with the trials of any action.

Q. I just asked you that question.

A. No, sir.

Q. You did not?

A. No, sir. I say I had nothing to do with the trials of any of the actions until the present trial, and that I took because Mr. Hollister was over on the other side in the army.

Q. May I ask you, who had direct charge of the first three trials?

A. Mr. Rourke and Mr. Powell.

Q. Both of those gentlemen were in your employ at that time?

A. Yes, sir.

Mr. Ward: Thank you.

HUGH ROURKE, was duly sworn as a witness in rebuttal on behalf of the plaintiff:

Direct examination.

By Mr. Ward:

Q. Mr. Rourke, you are a member of the bar of 20 years or more standing?

A. Well, nearly 20 years. About 19, 18.

Q. And for a good many years you were trial counsel for Mr. Spratt's firm?

934 A. Yes, for quite a number of years.

Q. You tried personally the first three trials of this action, did you not?

A. Yes.

Q. And you had charge of the preparations for trial?

A. I had. It was assigned to me.

Q. And you investigated the case carefully on the various trials?

A. I thought so, yes.

Q. Those were sharply contested trials that you and I tried against each other, were they, Mr. Rourke?

A. Well, you tried them very sharply. I know that.

Q. Mr. Rourke, a gentleman named Kells testified here that he was the lampman——

Mr. Spratt: Just before Mr. Rourke answers I want to interpose an objection.

Q. (Continuing:) —that he was a lampman whose duty it was to light dwarf 6, and that he came up to Mr. Spratt's office prior to, or upon the first trial, and stated there that he had put that lamp in place at 3:30 on the afternoon of Mr. Kinney's accident, and that it showed purple at that time, the light showed purple. Was that statement ever made to you?

Mr. Spratt: I object to that. Just let me ask, Mr. Rourke, you were counsel and attorney in this case under our firm?

A. Yes.

Mr. Spratt: And did you ever have any talk with Mr. Kells?

935 A. I have no recollection of any talk with Mr. Kells.

Mr. Spratt: I object to any evidence that he had no talk with Mr. Kells pertaining to what Mr. Kells said, or anything about it.

The Court: If he testifies in answer to your question that he never had any talk with him at all, that comes from the same place, doesn't it?

Mr. Ward: If Mr. Spratt wanted to ask Mr. Rourke the question, instead of my asking it, I had no objection. I wanted to ask Mr. Rourke a little further.

The Court: Isn't that an answer to Mr. Ward's question?

Mr. Ward: I think it is a complete answer to my question.

The Court: That is, your objection would be under Section 831, wouldn't it?

Mr. Spratt: Yes.

The Court: That is what you mean, under that section as to privilege?

Mr. Spratt: Yes.

The Court: It is answered now so I don't think we need to get that question up in the case at all.

Mr. Ward: Mr. Rourke testifies in answer to Mr. Spratt's question that he never had any conversation.

The Court: That would include this.

Mr. Spratt: He said never had any statement.

Mr. Ward: Conversation.

936 By Mr. Ward:

Q. Was that statement ever brought to your attention as the lawyer in charge of this case?

Mr. Spratt: I object to it as incompetent and irrelevant.

The Court: I will allow it.

Mr. Spratt: Privileged by the section.

A. No, sir.

Mr. Spratt: Exception.

A. That is to me personally. I don't dispute that he might have made that statement at Mr. Spratt's office.

Q. But it was never brought to your attention?

A. It was never brought to my attention.

Q. The fact that you did not produce this witness on the trial was commented on by me, wasn't it?

Mr. Spratt: I object to it as incompetent, irrelevant and immaterial, and improper.

The Court: When was it commented on?

Mr. Ward: I call your attention to my brief used on the second trial——

Mr. Spratt: It is incompetent, irrelevant and immaterial what he commented on.

The Court: For what purpose are you asking this question?

Mr. Ward: For the purpose of showing that I brought to the attention of the attorneys for the defendant the fact that
937 this witness was not produced prior to the third trial, and he was then not produced.

The Witness: I could not pretend to say——

Mr. Spratt: It is incompetent and improper for any purpose, what comment was had by counsel with each other in a proper trial. That is not evidence.

The Court: It has a bearing on this question. It is asking for an explanation as to why this man was not produced before.

Mr. Spratt: It is incompetent and improper under the Code.

The Court: Under this Section 831?
Mr. Spratt: Yes.
The Court: Oh, I don't think so. I can't see that.
Mr. Spratt: I will take exception to it.
The Court: I will give you an exception if it is on that ground
Mr. Spratt: Yes. It is all bearing on the other question.

Q. My question was, was it commented on in my brief on the appeal from the second trial that this man who lighted this lamp was not produced?

Mr. Spratt: I object to that as incompetent, irrelevant and immaterial.
The Court: Objection overruled.
Mr. Spratt: Exception.

A. I have no recollection as to your comments specifically before the jury on those three trials.
938 Q. I don't refer to the jury. I refer to my brief before the Appellate Division, to which I called your attention.
A. I wouldn't say. I haven't read it. The brief has not been called to my attention, the argument in the Appellate Division, until now.
Q. Will you be kind enough to look at it?

Mr. Spratt: Again I object to the whole proceeding.
The Court: Same ruling.
Mr. Spratt: Exception.
The Court: It cannot hurt anybody.
Mr. Spratt: I think it can, and that is the reason I took exception to it.
The Court: I don't agree to that. I don't think it will hurt anybody.

A. You have a statement in your brief to the Appellate Division to that effect.
Q. You argued that case in the Appellate Division, didn't you, Mr. Rourke?
A. I think so.
Q. Did you talk to the lampmen that put the lamps in the tower—did you talk to the lampmen and investigate the lampmen who put the lights in that dwarf at that time?

Mr. Spratt: I object to that as incompetent, irrelevant and immaterial and improper, and privileged under the Code.
The Court: Same ruling.
Mr. Spratt: May I ask him a question?

By Mr. Spratt:

Q. If you did talk with this lampman or others connected with the case, did you talk with them as an attorney in the case?
939 A. Absolutely, as a member of your staff assigned to the case.

Q. As attorney in the case?
A. Yes, sir.

Mr. Spratt: I object to any knowledge that came to the attorney while acting as such, as privileged, and he has no right to testify to it, and it is wholly incompetent and improper.
The Court: Same ruling.
Mr. Spratt: Exception.

A. I can't answer that yes or no. I would like to make an explanation.

Mr. Ward: I have no objection to it. You may make an explanation.
Mr. Spratt: I have, under the position I have taken.

A. I investigated to find out.
Mr. Spratt: That is to be ruled on.
The Court: Same ruling.
Mr. Spratt: Exception.

A. I investigated to find out as to whether or not those signals and lamps had the attention of a lamp man on that day, and my investigation led me to believe and convinced me that they had, but as to who the person was that gave them that attention I could not determine, or it was never disclosed to me by that man or anyone else. That is all I can say.

Mr. Ward: That is all.

Cross-examination.

By Mr. Spratt:

Q. Mr. Rourke, you tried the case and were in court when the case was being tried these first three times?
940 A. Surely.
Q. So that if anyone came to the office—if Mr. Kells came to the office while the trial was on you would be in the court room?
A. Why, certainly, I would be here during the court hours.
Q. At that time there were several men in our office, were there not?
A. Oh, yes, a number on the staff, four or five trial attorneys.
Q. So that at times when one was trying a case it was frequently necessary for someone else to look after the witnesses and interview them?
A. Oh, undoubtedly, absolutely the practice.
Q. So that this man might have been interviewed in our office——
A. I wouldn't dispute it for a moment.
Q. And the one that interviewed him might have failed to report it to you?
A. That has frequently happened, that information didn't get to me that was supposed to get to me.
Q. With the large number of witnesses that were in this case

it would not be unusual that there was a slip in this case somewhere?

A. Not only this case, but a large number of other cases that I had. This particularly.

941 DAVID WILLIAM GOODFELLOW, was duly sworn as a witness in rebuttal on behalf of the plaintiff:

Direct examination.

By Mr. Ward:

Q. Mr. Goodfellow, did you use to be a signal man?
A. Yes, sir.
Q. For the New York Central?
A. For the New York Central.
Q. For how many years?
A. Eight years, as lampman first and then as signalman.
Q. Were you acquainted with the signals and blocks at Tower 55?
A. Not at 55 I wasn't, but I worked on the same kind of signals.
Q. You had experience with similar signals?
A. Similar signals.
Q. Are you familiar with the machine of the type which is here in court?
A. The same type as that, yes.
Q. Do you know how the connections are made between the machine and the signals, dwarf and otherwise?
A. Yes, sir.
Q. For how many years were you a lampman?
A. I was a lampman about two years, and then the remainder of the time I was repairing nights, during that time, nights and days both.
Q. You had the care of signal apparatus similar to that used in Tower 55?
942 A. Yes, sir.

Mr. Spratt: That is a little leading, of course.
The Court: Yes, that is leading. You object to it for that reason?
Mr. Spratt: I object to it as leading just for the sake of variety.
The Court: Of course Mr. Ward has been making objections on the ground of leading questions, and I have defined to the jury what a leading question is, so that they understand. It is a question that suggests the answer.

Q. How many years did I understand you to say that you had had charge of work of this sort?
A. I have been around that kind of business for about eight years.
Q. During what period, from what year to what year?
A. From February, 1902, to 1910.
Q. Have repaired and had experience with wires and the various connections that moved those signals?
A. Yes, sir.

Q. Was it a part of your duty during a considerable portion of your employment to inspect such signals?

A. Yes, sir.

Q. Did you have anything to do with their repair?

A. I did.

Q. Did you ever observe dwarf signals similar to dwarf signal No. 6 in this case, and which were connected with chains and wires to a tower like the Tower 55, failing to operate?

943 Mr. Spratt: I object to that as incompetent, irrelevant and immaterial, entirely speculative, not confined to the tower in question, nor at the time in question.

The Court: Can't this be confined to this period and to this tower?

Mr. Spratt: And also that it is a part of the counsel's case in chief, not rebuttal.

The Court: This question has been up before, I find. You called my attention to it, you know, and I find on looking it over that the same question was up on the former trials, and that on the former trials this testimony was held competent by Justices Emery, Lambert, Pooley, and Brown, but was held incompetent by Judge Wheeler.

Mr. Spratt: It was held competent by those judges because there wasn't any proof at that time that the signal had been taken care of, and was in good shape, as was witnessed by the testimony of Kells. That changed the situation entirely. Here we have Kells, who testified that the day of the accident at half-past 3 o'clock he lit the light, inspected it, it was in good shape, wires and all, and then the testimony of the towerman that he didn't operate it from that time until after the accident. It came down to Judge Wheeler——

The Court: I see what he had to say, and I feel the obligation resting on me to go with the majority of my brethern, that is four that have ruled the other way. I am going to rule with them.

944 Mr. Spratt: I say the conditions are entirely different. I don't think that majority on the question of law should govern.

The Court: Not necessarily a majority, but because I think they are right. That is the reason I shall allow the evidence.

Mr. Spratt: Exception.

(Question read as follows: "Did you ever observe dwarf signals similar to dwarf signal No. 6 in this case, and which were connected with chains and wires to a tower like the Tower 55, failing to operate?")

A. I have.

Mr. Spratt: I move to strike it out.

The Court: Motion denied.

Mr. Spratt: Exception.

Q. State to the jury in what respects you have observed them fail to operate?

Mr. Spratt: The same objection. The conditions are not the same, the time is not the same. The condition of the wires——

The Court: Very well, I will give you the benefit of an exception, so that you can be protected.

Mr. Spratt: Your Honor, how can we meet such testimony that he gives of something that happened years ago, and at different places, and under different conditions? We are put right here before the jury, and we cannot meet them, but we are prepared to meet the question at issue.

The Court: We have had brought here a good deal of evidence to show this machine, and the way it operated, that it was a
945 perfectly correct machine, and the inference would be that it was always correct.

Mr. Spratt: No, we have proved that it was operating that day correctly, and proved that by the man who inspected this particular one and the other man who operated it when the cars were there. Now, you might just as well say that because an automobile operated badly on one day that a year after it operated badly when some accident arose. We are not prepared to meet this eight years' experience running over a territory that we don't know anything about.

Mr. Ward: This proof, you know, was offered from the beginning. It wasn't something that just happened.

The Court: I think it has some bearing upon the condition of this machine at this time, and therefore I am going to allow it.

Mr. Spratt: Exception.

(Question read as follows: "State to the jury in what respects you have observed them fail to operate.")

A. Why, I have seen them fail to operate through over-sized chain, the connection with signals where they would be four wheels high in the lead outs, where there is chances where you can't always, the men, your helpers wouldn't get them oiled, et cetera——

Q. I was going to ask you about the mechanical side of it
946 later, but I don't think you got the question I asked you. Just read that question to Mr. Goodfellow again.

(Question read.)

A. Why——

Q. I mean by that, what would they do? Would they stick at clear or danger?

Mr. Spratt: I object to that as leading and suggestive.

The Court: It is leading and suggestive, and is objectionable for that reason.

Q. What have you seen them do?

A. I have seen them stick at clear and stick at danger, both.

Q. Have you ever noticed on those occasions when you would see a dwarf sticking at clear or sticking at danger, what the condition of the lever in the tower would be?

A. I have seen—yes.

Q. What have you noticed in that respect?

A. Why, I have noticed that they would be reversed from what they would be intended to be.

Mr. Spratt: Same objection.
The Court: Same ruling.
Mr. Spratt: Exception.

Q. Just tell us what you mean by that a little more fully.
A. I mean if the signal was meant to be at danger or to be clear, the lever in the tower would be just the opposite way. It would be stuck just the opposite way.
Q. What are some of the causes of dwarf signals sticking at clear or at danger?

Mr. Spratt: I object to it on the same grounds as before.
947 The Court: Same ruling.
Mr. Spratt: Exception.

Q. Now you can tell us what the causes are.
A. Now, the causes are from over-size chain at that time, falling off, being extra heavy, and the slack will leave them fall down and catch in the chain or in the wheels, and from No. 10 signal wire they used at that time jumping over little pulley wheels and getting stuck inside the pulley, between the wheel and the carrier, and the eyes of which connected the chains and link wire together, being caught the side of ties.

Mr. Spratt: I ask that that be stricken out as entirely speculative.
The Court: Denied.
Mr. Spratt: Exception.

Q. What is a split link?
A. A split link is connected between the wire and the chain. That is the way you use—it splits so as to get the wire in there to fasten it in.
Q. Does that have anything to do with these derangements that you have testified to?
A. Yes, sir.
Q. At tower 55, Mr. Goodfellow, it has been testified that those wires ran from the tower alongside the track, and then crossed under a track where they are all open over to the dwarf. Have you ever observed the effect of interference by passers-by and things falling from trains on those wires on the signals?
A. Yes, I have.

Mr. Spratt: I object to it. No proof that he ever observed these wires or observed those conditions that were there at the time
948 of this accident or before it, or that would affect it in any way.
The Court: I understand. He is speaking of this system in general as I understand it?
Mr. Ward: Yes.
The Court: With which he says he has been familiar for many years. Proceed.
Mr. Spratt: Exception.

Q. What have you noticed as to the effect of those things on wires running out along the ground exposed and unprotected?

A. I didn't catch that.

Q. What have you noticed about the effect of interference on such wires?

A. Why, it interferes in a way that they get twisted and tangled up, and caused the machine and mechanism not to work perfectly at times.

Q. When the wires get twisted or tangled up, have you observed whether or not that causes the dwarf signals to stick?

A. At times.

Mr. Spratt: I object to it on the same grounds I urged before to this line of testimony.

The Court: Same ruling.

Mr. Spratt: Exception.

Q. You have seen this plant there at Tower 55 many times?

A. I haven't right around the ground, but I have passed it going by in trains, etc., most the same thing.

Q. You have observed it, I suppose?

A. Yes.

949 Mr. Spratt: I object to that as leading and suggestive.

The Court: Yes.

Mr. Spratt: I ask that it be stricken out.

Mr. Ward: I consent.

The Court: Yes. Ask him if he observed it.

Q. Have you observed it?

A. I have.

Q. When a dwarf signal connected up as this was at Tower 55 gets stuck either at clear or danger, can you operate the other switches and signals?

Mr. Spratt: I object to it on the same grounds as I urged to the other.

The Court: Same ruling.

Mr. Spratt: Exception.

A. That is according to a man's conscience, and the man you have got in the tower, et cetera, whether you want to.

Mr. Spratt: I object that he never was in this tower or knows the connection.

Q. I mean, Mr. Goodfellow, can the machine be operated even if the dwarf is stuck at clear or danger?

A. It is not supposed to be.

Q. I say, can it be? Is it physically possible to do it? Is there anything that would stop the operation of the machine if a dwarf signal connected up as this was is stuck at clear or danger? Can you still work the levers on the machine?

A. Yes.

Mr. Ward: You may ask.

950 Cross-examination.

By Mr. Spratt:

Q. Mr. Goodfellow, you say you worked for the New York Central?
A. Yes, sir.
Q. And you left there in 1910?
A. 1910.
Q. Did you have trouble?
A. No, I quit.
Q. A towerman's strike, was there?
A. Why, there was a strike come off at that time and I quit the road.
Q. And never went back?
A. Never went back. I thought I would rather work for my own self.
Q. The railroad didn't feel they could give you what you wanted?
A. I never stopped to see. I had another trade and I went to work at that.
Q. But you did strike? You did go out with the strike, didn't you?
A. Yes, sir, we went out.
Q. Were you ever in tower 55?
A. No.
Q. You never were?
A. Not in 55.
Q. Then the only thing you know about tower 55 is that you sometimes rode by there on a train?
A. Rode by there on the train, yes.
Q. How far was tower 55 from the railroad?
A. From the railroad?
Q. Yes.
A. It was right close to the track.
Q. (Counsel measures on map.) About nearly a half an inch, isn't it?
951 A. I can't see.
Q. Doesn't it look that way to you? Nearly half an inch from the rail, the nearest rail to the tower?
A. Why, according to your rule.
Q. According to that?
A. Yes, about that.
Q. That would be 25 feet from the track?
A. Yes.
Q. Or nearly that? You don't know what kind of wires they used in that tower, do you, personally?
A. Yes, they were all standard wires, all over the same, No. 10.
Q. What is this wire here that I have (showing Exhibit 6 to witness)?
A. That looks like the No. 10 they used at that time.
Q. That is what you say is a No. 10?
A. No. 10.

Q. Isn't it a No. 9?
A. 9 or 10.
Q. You have changed now? You say it may be No. 9?
A. It is about the same size wire.
Q. You were never in the tower yourself to know, were you?
A. Not in that one tower, no.
Q. You don't know whether there was any over-size chains there or not, do you?
A. At that time there was——
Q. Will you swear that there was at this tower, or connected with it, any over-size chain?
A. Yes.
952 Q. How do you know?
A. I know because there was over-size chains all along the line, and it was after that——
Q. Were you at this tower? Can you tell this jury that you know and swear that there was over-size chain at this tower, of your own knowledge?
A. There was an order out for all over-sized chains to be changed.
Q. No. From your own knowledge?
A. I know they had an order out to change it on the section.
Q. Of your own knowledge can you swear that there was at this tower, on the 12th day of October, 1908, any over-size chain in connection with it?
A. Not at that time, no. I know there had been.
Q. You don't know, do you? You don't know of your own knowledge?
A. No, not that particular date I don't know.
Q. Do you know what the size of the chain was on the date this accident happened at tower 55?
A. No.
Q. What is the difference between an over-size chain and a standard size chain?
A. One was a good deal larger than the other.
Q. How much larger?
A. About a quarter of an inch.
Q. What is the size of the standard?
A. Well, I couldn't tell you just now what it is.
Q. What was the size of the over-size chain at that time?
A. I couldn't just tell you what were the dimensions. I
953 know we called it over-size chain. I never measured it. We asked for that chain that they got.
Q. You say it was possible for them at times to stick at clear? Is that right?
A. Yes, sir.
Q. And also at danger?
A. Yes, sir.
Q. Now, you don't know on the date in question whether any of the apparatus caused this to stick at clear, do you?
A. No, I don't.
Q. Or at danger?

A. No, sir.

Q. You don't know anything about the conditions that existed at the day of this accident, do you?

A. Not the day of the accident, no, sir.

Q. How would a twisted wire cause a signal to remain clear when it should be at danger?

A. I beg your pardon?

Q. (Question read.)

A. How would a twisted wire?

Q. Yes.

A. It would be twisted, that is all, so that you couldn't move them either way. According as it is twisted—when the signal is clear and got twisted in the meantime it would stay there.

Q. Couldn't it be pulled by the man having the lever?

A. Sure, he could change the wires according to the condition at that time.

Q. If it was twisted it would indicate to him when he pulled the lever the condition of it?

954 A. That is according to the man.

Q. If he was a good skillful man he would know, wouldn't he?

A. If he was a good man, you would see then, the towermen, lots of them, take them and turn over easy. That man would be a man that would find it quick, but you take a man that comes that stuff (indicating), it would come over and he wouldn't know it.

Q. A good skillful careful man would quickly discover it, wouldn't he?

A. Sometimes he would and sometimes he wouldn't.

Q. Could an inspector who looks them over see whether they were twisted or not?

A. Yes, sure.

Q. So that if he was a good careful man and made his inspection he would see whether it was twisted or not?

A. Sure he would.

Q. You spoke about the wire jumping over. How would that affect the signal?

A. The wire jumping over?

Q. Yes, didn't you say something about a jumping over?

A. Jumping over, the wheels becoming broke in, and the carriers being chipped off, so that the wire would slide down in between and get caught in between the carriers and the wheel.

Q. That could be seen by an inspection, could it not?

A. That could be seen by an inspection.

955 Q. But a man operating, could he discover that too if he was a good careful, skillful operator of the levers?

A. That is all according to how strong a man felt in pulling it.

Q. I meant if he pulled it, and was skillful about it, he could tell, could he not?

A. Not always.

Q. But an inspector could tell?

A. A man on the outside by looking over it could tell easy. Sure he could see it if he was there.

Q. Did you speak something about at times the lever would indicate that the signal was clear when it was the opposite?
A. Yes, sir.
Q. What would cause that condition?
A. Why, different reasons would cause that.
Q. What is that?
A. I have seen different reasons.
Q. Give us the reasons that would cause that condition.
A. I have seen it when there was a bent spindle.
Q. Where is the spindle?
A. The spindle goes through the center of the top of the dwarf.
Q. Would that pull out?
A. Which the spec works on?
Q. Would that be observable from inspection if it was bent?
A. Yes.
Q. And would that be observable to the man who was operating by the feel of it?
956 A. Not always.
Q. Would it in most instances be?
A. No, sir.
Q. Why?
A. Because the man in the tower, they don't—they are just there to do their work and such things. They don't pay attention about the outside.
Q. If it was a good careful man—there would be a different kind of a pull, wouldn't there?
A. That is according to the conditions. All your material outside.
Q. I say, if the spindle was bent wouldn't there be a different kind of a pull of the lever then?
A. You can't always tell because——
Q. Can a good careful signalman tell?
A. Not always.
Q. Can he most of the time?
A. He can sometimes.
Q. Did you ever operate a tower yourself?
A. When I have been repairing signals I would go up and try them to see if they were all right when I left them.
Q. Were you engaged in mechanical or electrical repairs?
A. Mechanical and pneumatic.
Q. What is your occupation now?
A. Barber.
Q. Where are you employed?
A. Employed for myself.
Q. Whereabouts?
A. Tonawanda street, Black Rock.
Q. You spoke something about a split link. What is there to the split link?
957 A. Why, at that time I was just explaining that the link was in between the eye and the chain in the connection.
Q. So when you give your experience it is not with reference to

actual experience in tower 55 at all, is it?
A. It is experience on the same kind of work.
Q. I say, it is not in regard to tower 55 at all, is it? Your evidence doesn't relate to tower 55 from actual experience at that tower, does it?
A. It relates to the same kind of mechanism.
Q. Just answer that yes or no.
A. The same kind of mechanism:
The Court: Just answer his question. This is cross examination. You are required to answer his questions just as they are put.
A. Not at that immediate tower, no.
Q. I suppose you have never been to Mr. Ward's office, have you?
A. Been to Mr. Ward's office?
Q. Yes?
A. Why, sure. I have known Mr. Ward for years.
Q. In regard to this lawsuit have you been up there?
A. I went over my testimony, yes. I have been away from the road——
Q. I suppose you walked right to court with Mr. Ward and saw him here in the court room?
A. Sure, I saw him here. I have seen you too.

Mr. Spratt: I am surprised that he would do that after lecturing my witnesses.
958 Mr. Ward: What I was lecturing them about was changing their testimony after they have been over there. They have a right to go over to your office

Redirect examination.

By Mr. Ward:

Q. What were these other towers that you worked at?
A. I worked in the mechanical towers from Tower 59 to 65.
Q. Those towers are located where?
A. From Tonawanda to Niagara Falls.
Q. One other question I wanted to ask you. At this time, along in 1908, what did the force consist of that took care of things?

Mr. Spratt: I object to it, unless it is confined to this particular case. It is immaterial anywhere else.

Q. I don't mean the names of the men. I mean different jobs.
The Court: Does he know? Do you mean as to this interlocking system?
Mr. Ward: This interlocking system.
Mr. Spratt: Do you mean including 55?
Mr. Ward: Yes, including 55.

Q. What positions——
A. At that time there was an electrician.
Q. How many towers would he have charge of?
A. He would have just as many as I did.

Mr. Spratt: I object to it as incompetent, irrelevant and immaterial.

The Court: Same ruling.

959 Mr. Spratt: Exception.

A. If he was the same as I was he was under the same ruling.

Q. You were a lampman?

A. I was a lampman at one time.

Q. So that at each tower or series of towers there is an electrician, a lampman and what else?

A. There is a repairman and two helpers. That is according to the size of the section.

Q. Are there inspectors?

A. At that time we didn't have any inspectors. We had to do our own inspecting. The lampman—everybody was supposed to inspect.

Mr. Ward: That is all.

Mr. Spratt: That is all.

THOMAS D. POWELL, was duly sworn as a witness in rebuttal in behalf of the plaintiff:

Direct examination:

By Mr. Ward:

Q. Mr. Powell, you are a member of the Erie County Bar?

A. I am.

Q. And you have been for quite a number of years?

A. Yes, sir.

Q. Longer that you or I like to mention?

A. Well, I don't know about yourself.

Q. You were associated with Mr. Spratt in the practice of law for a good many years?

960 A. Yes, sir.

Q. You were there during the first three trials of the Kinney case, were you not?

A. Yes, sir.

Q. You participated in those three trials, did you not?

A. No, not in the first one.

Q. In the second and third?

A. Second and third.

Q. Were you there at the time of the trial of the first one?

A. Yes, sir.

Q. You argued some of the appeals, particularly the argument in the Court of Appeals, did you not?

A. Yes, I had that pleasure.

Q. And you assisted Mr. Hollister in the fourth trial of the action, did you not, as special counsel?

A. In the fourth trial.

Q. While you were associated with Mr. Spratt and Mr. Rourke in the first three trials of the action did you ever see or talk to——

Mr. Spratt: I object. Before you answer I want to object, and ask you a question.

Q. Did you ever see or talk to a towerman named Kells, who claimed that he knew what the signal showed at half-past 3 in the afternoon?

Mr. Spratt: I will waive it.
The Court: Do you waive the privilege?
Mr. Spratt: Yes, I waive it.

A. Will you repeat the question?

(Question read).

A. I did not.

961 Q. Did you know of any claim or statement of that man on the subject?

A. I did not.

Q. Did you investigate or participate in the investigation of the condition of that signal prior to the accident?

A. Me personally?

Q. Yes.

A. No, sir.

Q. Well, I mean was it done under your direction?

A. Well, I don't know, Mr. Ward, whether it was or not.

Q. Then, as I understand you, you never heard that such a claim was made during the first three trials?

A. With reference to Mr. Kells?

Q. Yes.

A. I did not.

Cross-examination.

By Mr. Spratt:

Q. There were several men in the office?

A. There were.

Q. The first trial, you had nothing to do with it?

A. I couldn't say, no, except if I may just explain.

Q. It was Mr. Rourke's case?

A. It was Mr. Rourke's case, and we talked it over as a general matter of talk, as we frequently did. I didn't have anything to do with the management of it or the trial of it.

Q. Or the witnesses?

962 A. Or anything of that kind.

Q. There were several other trial lawyers in the office?

A. There were.

Q. So that Mr. Kells may have come in and talked with any one of them without your knowing it?

A. He might.

Mr. Spratt: That is all.
Mr. Ward: That is all.

EDMUND T. JOHNSON, was duly sworn as a witness in rebuttal in behalf of the plaintiff.

Direct examination.

By Mr. Ward:

Q. Did you use- to be a signalman for the New York Central?
A. Yes, sir.
Q. When did you start in?
A. Why, I don't just recall the year.
Q. When did you stop?
A. The Pan-American was 1911, was it?
Q. 1901.
A. I started in 1902.
Q. How long did you work for them?
A. Nine years and a half.
Q. What did you do?
A. I started in as lampman taking care of lamps, and worked four years at that, after which I was promoted to helper, and from helper to assistant maintainer.
963 Q. What territory did you cover?
A. When I first started on the road I covered the territory between tower 57 and tower 55.
Mr. Spratt: What years?
A. 1902 to 1906, I think it was.
Q. What other towers did you have experience with besides 55, 56 and 57?
A. Tower 58, Erie 2 and 3 and all the other towers between Tonawanda and Niagara Falls.
Q. The towers between Tonawanda and Niagara Falls that Mr. Goodfellow has been testifying about, were those similar in construction and operation to Tower 55?
A. Yes, sir.
Q. The connections between the machine and the signals was made in the same manner?
A. Yes, sir.
Q. Same type of signals?
A. Yes, sir.
Q. And the same type of machine?
A. Yes, sir. Or, I will not say it is the same type of machine. Tower 58 and a half and 59 had their interlocking below the floor of the tower, and some of them had the interlocking on the same floor with the levers.
Q. I don't mean the position of the machine. I suppose that varied in every place, the length and connections were all varied?
A. Yes, sir.
Q. But I mean the same character of machine?
A. Yes, sir.
Q. Did you continue to be acquainted with Tower 55 up to the time you left the service of the company in 1910?

964 A. Yes, sir.
Q. Did you visit that tower from time to time?
A. I did.
Q. On your duty and otherwise?
A. Yes, sir.
Q. And were you familiar with dwarfs and connections between towers and dwarfs similar to dwarf 6, and the connection between dwarf 6 and tower 55?
A. Yes, sir.
Q. Were you familiar with that particular dwarf and that particular tower?
A. Yes, sir.
Q. Mr. Johnson, in your experience as a repairman, lampman, etc., can you tell us whether or not from time to time those dwarf signals would fail to respond to the lever indications?

Mr. Spratt: I object to that.
The Court: Same ruling.
Mr. Spratt: I would like to ask the witness a couple of questions first.
The Court: Yes, preliminary to the direct examination.
Mr. Spratt: Yes.
The Court: Yes, you may do that.

By Mr. Spratt:

Q. When did you last work in the territory including Tower 55?
A. Why, I should judge in the neighborhood of two or three months.
Q. I say, what year was the last time you worked there?
A. Right up until the time—well, we were sent all over.
965 Q. I just asked you when was the last time you did any work in Tower 55, or in connection with Tower 55?
A. Well, right up until I left the railroad.
Q. When was that?
A. That was 1911, I think it was.
Q. When was the last time you had done any work there previous to October 12, 1908?
A. About two months, two months and a half, three months. Somewhere around there. I can't state definitely.
Q. Before that?
A. Before that, yes, sir.

Mr. Spratt: If the court please, I object to the testimony of this witness on the same grounds that I objected to the same kind of testimony that the witness Goodfellow gave, and on the ground that it appears now that three months before this accident he had last been there.
The Court: Same ruling. I will give you an exception.
Mr. Spratt: Exception.

(Last question of counsel for plaintiff read as follows: "Mr. Johnson, in your experience as a repairman, lampman, etc., can

you tell us whether or not from time to time those dwarf signals would fail to respond to the lever indications?")
A. Yes, sir.

By Mr. Ward:

Q. What have you noticed in that respect?
966 A. Why, I have noticed wire carriers being broken off, causing the wire to be catched. They are a little iron frame with the wheels in that the wires run on. The wire carriers—the wheels would be broken and the wires would catch on the side, holding the wire from going through, and often would cause a signal to stay at clear or danger, and also wires twisting. We had a great deal of trouble with that at Tower 55, because people crossing over to the malt house there and going through that——

Mr. Spratt: I object to that as not responsive.
The Court: I have permitted him to answer, and give you an exception.
Mr. Spratt: Exception.

A. Going through to that street. People going back and forth to work would cross over there, stepping on the wires, causing them to twist.
Q. Have you ever found a particular dwarf stuck at clear?
A. I have.

Mr. Spratt: I object to that as incompetent, on the same ground, unless it is confined to the time in question.
The Court: Same ruling.
Mr. Spratt: Exception.

Q. And on the occasion when you have found that dwarf stuck at clear how did the lever show in the tower.
A. Normal.
Q. That means danger, doesn't it?
A. Yes, sir.
967 Q. Could the operator orperate his other levers and switches?
A. Yes, sir.
Q. Without any reference to this dwarf being stuck?
A. Yes, sir.
Q. Did you repair that?
A. I did.
Q. Have there been other occasions in similar outfits to this when you have observed dwarf signals sticking at clear or danger?
A. Yes sir.

Mr. Spratt: Same objection.
The Court: Same ruling.
Mr. Spratt: Exception.

Q. You may state whether or not the sticking of those dwarf signals at clear or danger prevented the operation of the other signals in the usual manner?

A. No, sir.
Q. Weren't you doing some work on this tower at the time of the accident, or just before? Weren't you painting it?
A. Shortly before.
Q. How long before?
A. It wasn't the tower. It was the signals.
Q. How long before had you been doing that?
A. About a month.

Mr. Ward: I think that is all.

Cross-examination.

By Mr. Spratt:

Q. So that you were a painter there, were you, about a month before?
968 A. I was helping, yes, sir. I might state at this time——
Q. You have answered my question. Did you go out on this strike?
A. I didn't catch your question.
Q. Did you go out on the strike of the towermen?
A. Yes, sir.
Q. You haven't been back since, have you?
A. No, sir.
Q. What are you doing now?
A. Clothing salesman.
Q. I think you told me it was three months before this accident that you had been at this tower to do any work?
A. About that.
Q. At that time what work were you doing?
A. I was assistant maintainer.
Q. What work did you do there at that time?
A. We looked after the signals and switches.
Q. And did you put them in shape?
A. Yes.
Q. They were in shape when you left there?
A. I presume they were.
Q. That was your work, wasn't it?
A. Yes, sir.
Q. And you left it in good shape?
A. Yes, sir.
Q. When you were there painting did you notice things then?
A. No.
Q. You didn't take any notice then?
A. No, sir.
969 Q. Now, you say that the wire might catch in a broken wheel and prevent the signal from changing, one to the other?
A. Yes, sir.
Q. Could that be discovered by the man in the tower from his handling of the lever?
A. Not always.

Q. It could some of the time, anyway?
A. Some of the time.
Q. It could be discovered by the inspector and repairman, could it not?
A. Yes.
Q. All you would have to do would be to put a new wheel in there?
A. Yes, sir.
Q. Does the repairman carry those in his outfit?
A. Well, as a general rule they had one or two with them.
Q. So that is a simple repair, isn't it?
A. Yes, sir.
Q. Whenever you found anything wrong, wires twisted, you repaired that, did you not?
A. Yes, sir.
Q. That is an easy thing to repair?
A. Yes, sir.
Q. And that can be easily repaired, can it not?
A. Yes, sir.
Q. And you always did the repair when you found anything twisted there?
A. I did.
Q. So that if anyone walked over the wires and twisted them it was the repairman's duty to see that that twist was taken up?
970 A. Yes, sir.
Q. And that twist can be discovered, can't it, by the man in the tower?
A. No, not always.
Q. It can part of the time, can't it?
A. It all depends on the signal.
Q. It can be easily discovered at least by the man who is making the repairs, can' it ?
A. Yes, sir.
Q. Now, you were asked whether you observed sticking at other times. What was the cause of the sticking at other times that you have referred to?
A. Why, often in the winter time when the snow and ice was on the ground the wires go under the rails, and even that will cause it. It all depends on where the signal is. Not so much that particular signal. Moving ties will sometimes do it. They will get between the rail and the tie.
Q. Of course that can be repaired?
A. Yes, sir.
Q. You did repair it when you found any such place?
A. Whenever I found it, yes, sir.
Q. Now, you don't know what the condition of the tower was, and dwarf 6, and everything connected with it on the night of October 12th, 1908, do you?
A. No, sir.
Q. If the signal is in proper adjustment, there won't be any sticking, will there—proper adjustment with the lever?
A. Yes, sir.

Q. Under what conditions?
971 A. That all depends on the condition of the wire, whether it is twisted or no.
Q. If there is no twist in it?
A. Then it is all right. It will work O. K.
Q. If the wire is twisted the pulling wire should overcome the back wire, shouldn't it?
A. Not always.
Q. Do you know what kind of an interlocking machine was in Tower 55 at this time?
A. I believe that the machine there—I have seen it a number of times.
Q. Who was the manufacturer?
A. I couldn't tell you.
Q. Who was the manufacturer of the machine in the other towers that you have spoken of?
A. I couldn't tell you that.
Q. You don't know that?
A. No, sir.

Mr. Spratt: That is all.

Redirect examination.

By Mr. Ward:

Q. That job that you had, did repairmen ever have to go around and inspect?
A. Yes, sir.
Q. How often?
A. Why, we covered the territory. It all depends on the territory how much. Sometimes we did it every day, and two and three days.
Q. Do you know who the inspector or repairman was at Tower 55 at this time?
A. I don't know his name. He was a Polish man.
Q. There was such a man, wasn't there?
972 A. Yes, sir, he was stationed at Black Rock.
Q. Was it Somulski?
A. That is the name.
Q. Is he working for the railroad yet or don't you know?
A. I don't know.
Q. After you left the service of the railroad in 1910 did they ask you to come back?

Mr. Spratt: I object to it as incompetent, irrelevant and immaterial.
The Court: How is that material?
Mr. Ward: Mr. Spratt asked him if he went out on a strike. I thought he was trying to create an inference that Mr. Johnson was mad at the company, or something of that sort.
The Court: I believe we won't go any further on that question.
Mr. Spratt: In this connection might I ask Mr. Goodfellow one question, where he sits?
Mr. Ward: I will have him go back on the stand.

DAVID WILLIAM GOODFELLOW, resumed the stand for further cross examination by Mr. Spratt:

Q. What was the make of the machine in Tower 55?
A. 55? It looks to me like a Standard.
Q. That is the manufacturer? You say that is the Standard machine?
973 A. Standard Machine Company.
Q. So that the make of the machines in the towers were like this?
A. Yes, Standard and Federal both.
Q. And you think this one (indicating) is a Standard?
A. It looks to me like a Standard, yes.

GEORGE F. DOUD, was re-called as a witness in rebuttal in behalf of the plaintiff:

Direct examination.

By Mr. Ward:

Q. Mr. Doud, when you were working on the railroad as a conductor and yardmaster and train man, did you have any experience with dwarf signals similar to dwarf signal No. 6, prior to this accident?

Mr. Spratt: I object to it on the same grounds I have urged to the previous line of testimony.
The Court: Certainly. And the same ruling will be had and an exception given to the defendant.
Mr. Spratt: I say again it is eminently unfair that the witness should be permitted to testify to some other time, when we have no knowledge, and can't refute it here at this time.
The Court: I object to that phrase "unfair." I say he may testify and I will give you an exception.
974 Mr. Spratt: Also upon the ground that it is part of his direct proof.
The Court: Same ruling.
Mr. Spratt: Exception.

A. Yes, sir.
Q. Did you ever observe dwarf signals similar to dwarf signal No. 6 sticking at clear or danger when the lever in the tower showed an opposite indication?

Mr. Spratt: I object to it on the same grounds I urged, and also the witness is incompetent to answer. It is not in his line.
The Court: Same ruling.
Mr. Spratt: Exception.

A. I wouldn't be in any position to state how the lever would be in the tower by what that signal would say.
Q. Have you ever observed them showing a different indication than the switch points showed?

Mr. Spratt: Same objection and exception.

A. I don't understand that question.

Q. Have you ever observed them showing a different indication than the switches showed, the lever showing one thing and the switches showing another thing?

Mr. Spratt: I object to that as leading and suggestive.

The Court: He may answer.

Mr. Spratt: Exception.

A. Why, they have made mistakes in lining the iron up.

975 Q. That is not quite what I asked you. Have you ever observed those dwarfs sticking at clear or danger?

A. Oh, yes, many times.

Q. Have you ever examined them to see what made them stick?

A. I have examined them in this way: You would notice that the iron would be for you and the target would be against you, and pretty soon you would hear a man with a megaphone say, "Hey, Nigger, kick the jigger there. See if it will go down from up into the iron."

Mr. Spratt: I ask that it be stricken out.

Mr. Ward: I consent.

Mr. Spratt: I ask that the whole answer be stricken out.

The Court: It is agreed that remark may be stricken out.

Mr. Spratt: Exception.

Q. You would see that the tower didn't truly indicate the position of the switch?

A. That is the idea.

Q. Then what did you do?

A. Kicked the top of the spigot. Sometimes it would fall and sometimes it wouldn't.

Q. Would the rest of the switches and signals be operating from the tower at that same time?

Mr. Spratt: I object to it on the same grounds.

The Court: Same ruling.

Mr. Spratt: Exception.

Q. Would the other signals and switches be operating all

976 right from the tower at the time this was stuck?

A. There wouldn't be any other signals except that one.

Cross-examination.

By Mr. Spratt:

Q. Where did you see a dwarf sticking, and what was the date?

A. I couldn't answer that question. During twenty years of service I have seen a good many of them stick.

Q. Did you ever see one stick at Tower 55?

A. Yes, sir.

Q. When?

A. Well, during the time that I ran over that territory.
Q. How many years ago was that?
A. Well, it didn't very recent.
Q. How many years?
A. Well, we will say 1916.
Q. 1916? That was the time?
A. Yes, sir.
Q. That was the time you ran over there?
A. I ran over there quite a few years before that, too.
Q. That was the time you saw the dwarf stick, in 1916?
A. That is just one particular instance that I am giving you.
Q. Who was the towerman?
A. I don't remember that.
Q. Can you tell me the towerman at any particular time where you say that the dwarf stuck—any dwarf stuck?
977 A. The towerman's name?
Q. Yes, the towerman's name at that time.
A. Why, Mr. Reithenburg in tower 55 has given me a caution card. He has written me out a caution card.
Q. What do you mean by written you out a caution card?
A. A caution card is a card that states on there that the conductor and engineer will proceed from Tower 55 to such and such a point, on account of not being able to get a signal.
Q. That is when something was wrong with the signal?
A. That was the idea.
Q. He gave you a card under those conditions?
A. Yes, sir.
Q. Telling you that it was out of order?
A. That is the idea.
Q. Anybody else?
A. I can't recall the dates, because towermen are in the line of promotion the same as any other men.
Q. You can't recall the dates, nor can you recall the towerman?
A. I can't recall the towerman, but there are many many instances.

Mr. Spratt: I ask that that latter part be stricken out.
The Court: Strike it out.

Q. Nor can you recall the date?
A. No, sir.
Q. Do you know of the signal being clear and the lever normal?
978 A. I wouldn't be in any position to know that.
Q. You wouldn't know about that?
A. Why, no, he would be a distance of four or five hundred feet away from me.
Q. So that at these times when you say that the sticking was improper you don't know what the situation was in the tower, do you?
A. I don't know how the levers were arranged, no, sir.

Mr. Spratt: That is all.

Redirect examination.

By Mr. Ward:

Q. You understood, did you, the question that I asked you related to your experience prior to the time of the accident?
A. What was that question?
Q. The question as to what you observed prior to the time of the accident. Did you understand that that is what I meant?
A. That is before the accident.
Q. Before the accident. In answering my question and telling me what experience you had had did you understand that I meant before the accident?
A. Yes, sir.

Recross-examination.

By Mr. Spratt:

Q. At the time that you observed the dwarfs they were set at danger, were they?
A. What dwarfs?
Q. The dwarf that you said, where the switches didn't work in conjunction with the dwarf. The dwarf was at danger, wasn't it?
979 A. I couldn't positively state that.
Q. You could see the rails weren't set, or were set, but the dwarf was against you, didn't you say?
A. That might happen, Mr. Spratt.
Q. So that it was at all times the dwarf was set against you?
A. Not necessarily.
Q. At the time that they asked you to change or shut down the dwarf—or what did they ask you to do?
A. They were taking both positions, Mr. Spratt.
Q. Wasn't the dwarf against you at that time?
A. I wouldn't say so.
Q. And didn't they tell you to come on, under those conditions? Didn't you say they told you to come on?
A. I didn't say they told me to come on. I had authority to go. That card is authority for you to move.
Q. That card gave you authority to go?
A. Yes, sir, that is the idea.

Mr. Spratt: That is all.
Mr. Ward: That is all.

980 JOHN M. FREEMAN, was duly sworn as a witness in rebuttal in behalf of the plaintiff:

Direct examination.

By Mr. Ward:

Q. Mr. Freeman, what is your age?
A. Going on 57.

Q. Did you use to work at the Kam Malt house?
A. Yes, sir.
Q. What was your job there?
A. Electrical engineer.
Q. How many years did you work there?
A. Four years.
Q. Were you there on the 12th day of October, 1908?
A. Yes, sir.
Q. Did you work days or nights?
A. Days—part day and part night.
Q. Were you on duty at the time of this accident to Mr. Kinney?
A. Yes, sir.
Q. What part of the building were you in?
A. I was on the fourth story.
Q. Facing which way?
A. Facing towards the west.
Q. And from the place where you were could you see foward where the accident happened?
A. Yes, sir.
Q. Could you see down the track toward Hertel avenue and west?
A. Yes, I could see clean up to Hertel avenue.
981 Q. Did you happen to see Mr. Kinney's engine and the Michigan Central train coming down there together?
A. I see Mr. Kinney coming first.
Q. Did you later see the Michigan Central train?
A. I could see away up to about half a mile above Tower H yet.
Q. Where was the Michigan Central when you saw it?
A. Way up to Black Rock, almost up to the station as far as I judged.
Q. Did you see them come together?
A. Yes, sir.
Q. Was your attention on Mr. Kinney's engine when it went by you?

Mr. Spratt: I object to that as leading and suggestive.
The Court: Yes, he can just tell where he was looking and what he saw.

A. Mine was on Mr. Kinney at the time.
Q. Was your attention ever called to that map there (indicating), Mr. Freeman? Did you ever look at that?
A. Yes, sir.
Q. At some of these other trials?
A. Yes, sir.
Q. Where was the window that you were?
A. I was away up on this side towards the track (indicating). Here (indicating) is the malt house track and there is another one right in between the ware house, in between there (indicating), and it is about 150 feet from where I was.
982 Q. Out to where?
A. Out to this track over here (indicating).
Q. Out to the "Y" track?
A. Yes, sir.

Mr. Spratt: Will you mark that with "F" where you say the window was?

A. The fourth story.

Mr. Spratt: About where it was.

A. The fourth story.

Mr. Spratt: About where you say it was.

Q. Is it in the building marked "shed" or in the building marked "Kam Malt House"?

A. Kam Malt House (indicating).

Q. You are indicating a point about where the figure 5 is?

A. Yes, sir.

Q. As Mr. Kinney's engine passed by you could you see in the engine?

A. Yes, sir.

Q. How many men were in the engine?

A. Two.

Q. Where were they?

A. One of them sat at the window and one was standing in the gangway.

Q. Did either of them have a lantern?

A. No, sir.

Q. And did you continue to observe those two men until the time of the accident?

A. Well, I looked at the Michigan Central coming down just as she was close to Hertel avenue.

Q. Did you see those two men again?

A. Yes, I saw one in the window and one jumped.

983 Q. Then what did you do?

A. After they come together the Michigan Central raised speed up and come pretty close to Mr. Kinney, and then he put on the brakes and she slid about 50 feet.

Mr. Spratt: Who put on the brakes?

A. Put on the brakes. She slid about 50 feet.

Q. Which train was that?

A. The Michigan Central.

Q. I was not asking you about the Michigan Central. You said you saw one man jump.

A. Yes, sir.

Q. Did you see any more jump than one man?

A. No, sir, that is all there was there.

Q. You have seen all these various men in the court house at other times?

A. Yes, sir.

Q. And on this trial too?

A. Yes, sir.

Q. Which was the man that you saw jump?

A. Mr. Sauer.

Q. Then what did you do?

A. That is after I got down——

Q. After you saw the man jump—you were up in the window then, were you?

A. Yes, sir.

Q. Then what did you do?

A. I closed off my machinery and I went down on the electric elevator, and then I run out with my lantern, and he was outside what they call the warehouse.

Q. Who was?

A. Mr. Sauer. It was a man. I didn't know who he was
984 then.

Q. You have found out since who he was?

A. Yes, sir.

Q. Did you go over to the engine?

A. I asked him.

Q. Just answer my questions.

A. Yes, sir.

Q. This is rebuttal, and I can only examine you on certain points. Did you then go over to the engine?

A. Yes, sir.

Q. What did you find there?

A. I held my lantern by the engine there, and I thought—in the gangway, and I found a fellow there with just a cap sticking out, and I brushed the coal off his face.

Q. Was there anybody else there when you got there?

A. Well, I called Mr. Sauer.

Q. So that you and he were there together?

A. Yes, sir.

Q. Was there any other person there beside you and Mr. Sauer?

A. No, sir.

Q. At the time you got down there had the Niagara Falls train come along yet?

A. No, sir.

Q. Did that come along after you got there?

A. It come along about between 5——

Q. Did it come along there after you got there, the Niagara Falls train?

A. Yes, sir.

Q. What did it do with the caboose?

A. It shoved it on top—between the two engines.

985 Q. What happened to the caboose?

A. It set afire.

Q. Did you afterwards see Mr. Boyle there?

A. Well, I saw him afterwards coming up the track.

Q. Where was he coming from?

A. From the Military road out on the "Y."

Q. Were you able to identify him?

A. Yes, sir.

Q. Was he on the engine when it passed by your malt house?

A. No, sir.

Q. Did anybody on that engine have a lantern when it passed by your malt house?

A. Not as I noticed.

Q. Was there more than two men in that engine when it passed by your malt house?

A. No, sir, there was only two men in.

Mr. Spratt: I object to that as leading and suggestive and ask that the answer be stricken out.

The Court: Objection overruled.

Mr. Spratt: Exception.

Q. Were you able from your position to see through the space between the tender and the locomotive?

A. Yes, I could see right through because the Hertel avenue lights shone right this way (indicating).

Q. Where do you work now?

A. I am working for the Buffalo Pressed Steel Company.

Q. What do you do?

986 A. Fireman and engineer like.

Q. Was Mr. Kinney a stranger to you at this time?

A. Yes, sir.

Mr. Ward: You may ask.

Cross-examination.

By Mr. Spratt:

Q. This was what time at night, in October?

A. 20 minutes to 9.

Q. And this engine when it came along was 150 feet away from you?

A. It crossed.

Q. You know that the space between the gangway that you have spoken of that is in there from the engine to the tender is about 18 inches?

A. Oh, it is about 2 foot.

Q. About 2 foot?

A. A little over.

Q. You were up four stories high?

A. Yes, sir.

Q. Do you know how high an engine is? How high would you say this engine was from the ground?

A. Well, the engine was about 14, between 14 and 15 feet high, the cab.

Q. And the engine part, the cab, sticks over so that it is a protection from weather, between the engine itself and the tender, the fireman?

A. Yes, sir.

Q. So that is covered all over? And about how high up were you? How high, four stories high?

A. Well, the first floor is about 20 feet. The second floor is about 16.

987 Q. That is 36.

A. The third floor would be about 14 and the other one the same. I was on the floor on the fourth floor.

Q. 36 and two 14's were there, or one 14?

A. One 14.

Mr. Ward: 20, 16 and 14 would bring him to the floor of the fourth floor.

Q. That is 50 feet high from the ground you were?
A. Yes, sir.
Q. Do you mean to say that up there 50 feet high that night, with the covering that you have described on the engine running back to the tender, that you could look down and see that there were only two men in that engine?
A. Yes, sir.
Q. You swear to that?
A. Yes, sir.
Q. Could you look through the roof of the tender?
A. No, sir, I could see right down through this way (indicating), right 150 feet away I could look down like that.
Q Although it was nearly 9 o'clock at night?
A 20 minutes to 9.
Q. And you could see Kinney's features, could you?
A. He was on the same side——
Q. You saw him, didn't you?
A. Yes, sir.
Q. You recognized him afterwards as being the same man whom you saw sitting there?
988 A. No, sir, I recognized him when he come in here. I didn't—when I see him that night after I brushed the coal off his face.
Q. You recognized him as being the man who was sitting in the tender?
A. Yes, sir.
Q. Running the engine, did you?
A. Yes sir.
Q. And you recognized Sauer as being the man who sat in the gangway, did you?
A. Well, I tell you——
Q. Did you see his features so plainly from where you were that you recognized——
A. Oh, no. I couldn't——
Q. Could you see so plainly from your window there that you could tell that it was Sauer that stood in the gangway, and not Boyle? You have seen them both here, haven't you?
A. I seen him when he jumped.
Q. You saw him when he jumped?
A. Yes, sir.
Q. You were in the window then?
A. Yes, sir.
Q. And you could tell his features when he was jumping, could you? You could distinguish his features, could you, when he jumped?
A. I wouldn't swear to that.
Q. You wouldn't swear to that?
A. No.

Q. You wouldn't swear that it was not Boyle who jumped, would you?
A. Yes, sir.
Q. Could you tell when they jumped that it was Sauer and not Boyle?
989 A. Yes, sir.
Q. How were they dressed? Were they dressed different?
A. Why, Boyle had red hair and Sauer had black hair.
Q. So that you could tell that night at 20 minutes to 9, you off there, up there 50 feet, and 150 feet away, you could tell that the man who jumped from that engine had dark hair and not light hair? Is that so?
A. Mr. Boyle came up——
Q. Just answer that question.
A. I couldn't see 150 feet to see who the parties was.
Q. Then you couldn't tell who it was that jumped there, could you?
A. No, sir, because he got into the wires.

Mr. Spratt: I ask that that be stricken out.
The Court: Strike it out.

Q. You said that you saw Mr. Kinney's engine and where it was when you first saw it?
A. Right at Hertel avenue.
Q. Was there a caboose attached to it?
A. Yes, sir.
Q. Behind or in front of it?
A. In front of it.
Q. Did you see a man on the end of the caboose with a lantern?
A. No, sir.
Q. Did you see the caboose as it came up there until the time of the accident?
A. I seen the caboose and I seen the engine.
990 Q. Did you see the caboose that came up along there until the accident happened?
A. Yes, sir.
Q. Was there a man on the end of the caboose with a lantern?
A. I didn't see none.
Q. If he had been there would you have seen him?
A. I suppose I would.
Q. And do you swear the man was not there on the end of the caboose giving signals with a lantern?

Mr. Ward: He didn't say that.
Mr. Spratt: I don't care about that.
Mr. Ward: You say, "You swear."
Mr. Spratt: I say, "Do you swear."

(Question read.)

A. I couldn't answer that because I took notice of the——
Q. Can you tell one way or the other?

A. No, I couldn't swear to that, that the man was on the caboose.
Q. Was there any man giving signals on that caboose?
A. Not as I see.
Q. Will you swear that a man wasn't there giving signals on that caboose?
A. No, because I was taking notice of Kinney.
Q. At folio 1575, testimony of the fifth trial, did you testify: "You saw the engine shoving the caboose ahead of it? A. Yes, sir, I did. Q. So that the end of the caboose was nearer to you as you saw that caboose and engine approaching than the en-
991 gine was? A. Why, certainly, the caboose was ahead of the engine. I had to see the caboose first. Q. Yes. Did you see a man with a lantern standing on the front end of that caboose giving lantern signals with it? A. I did not. Q. Looking right at the caboose, which came first? A. Yes, sir. Q. The caboose nearer to you than the engine, and never saw the signals of a lighted lantern from a man on the front end of the caboose? A. I did not. Q. Looking right at the caboose? A. Looking at it I didn't see no—none of them." Did you testify to that?
A. Yes, sir.
Q. Did you testify further: "Q. So you would say there was no man on the front end of that caboose giving a lantern signal? A. No, there was not. Q. All right. You are positive about that? A. Yes, sir."
A. Yes, sir.
Q. So that you were positive then there was no man on the end of the caboose giving signals? Isn't that right?
A. Not as I see.
Q. You would have seen him, wouldn't you? He was in front of you?
A. Not giving signals.
Q. Did you see any man on that caboose?
A. No, sir.
Q. You did not?
A. I didn't take notice.
Q. Did you say that you looked down from where you were and saw the Michigan Central train down near the Black Rock station?
992 A. Yes, sir.
Q. How far away is the Black Rock station?
A. Well, it is a little over a mile.
Q. Straight track?
A. Yes, sir.
Q. You first saw Kinney's engine when it was at Hertel avenue, did you?
A. Yes, sir.
Q. And how far away was the Michigan Central train at that time?
A. At Hertel avenue Kinney was, and the Michigan Central was just coming up from Black Rock.
Q. Coming up from Black Rock?

A. Yes, sir, from Black Rock station.
Q. Leaving Black Rock station?
A. Yes, sir.
Q. That was over a mile from where this accident happened?
A. Yes, sir.
Q. How fast do you say Kinney was moving?
A. About four miles an hour.
Q. How much?
A. I should judge about four miles an hour.
Q. About four miles an hour?
A. Yes, sir.
Q. So that while Mr. Kinney was moving from Hertel avenue up to the place where the collision occurred this Michigan Central train had to come a mile away or more from Black Rock station?
A. Yes, sir.

Q. You claim you noticed two men, did you, in the cab?
993 A. That is all I did, yes, sir.
Q. At the bottom of page 385 did you answer this at the previous trial: "Q. As Kinney's engine went by you could see in the cab? A. Yes, sir."
A. Yes, sir.
Q. And was this question put to you: "Q. How many men were in the cab?" And did you answer, "I didn't see nobody"?
A. I said two.
Q. I will show you the answer (showing testimony to witness).
A. Well, that must have been on the caboose.

Mr. Spratt: I didn't ask you that. I ask that latter part be stricken out.
The Court: Strike it out.

Q. Let me call your attention here (indicating testimony): "Q. As Kinney's engine went by you could see in the cab?"
A. Yes, sir, I could.
Q. You testified to that, did you not?
A. Yes, sir, I did.
Q. And did you answer, "Yes, sir"?
A. Yes, sir.
Q. And was this question put to you: "How many men were in the cab?" And did you answer "I didn't see nobody"? Didn't you answer that?
A. I don't know. I might have.

Mr. Ward: Just read the next two questions.

Q. Wasn't this followed by another question: "Q. Didn't see anybody. Could you see Mr. Kinney?" And did you answer "Yes, sir" to that?
994 A. Yes, sir.

Mr. Ward: And the next question, please?
Mr. Spratt (reading): "Mr. Ward: He says he did not see anybody.
The Witness: I didn't see nobody."

—. Didn't you answer that?
A. Yes, sir. That is on the other——
Q. You answered that at the other trial?
A. That is on the front of the caboose.

Mr. Spratt: I ask that that be stricken out, his adding to it.
The Court: Strike it out.
Mr. Ward: Read the next question.
Mr. Spratt: You can read anything you want when I get through.

Q. Now, you had no trouble in seeing, as you claim, into this cab?
A. No, sir, I did not.
Q. And you saw it as it came right along, didn't you?
A. Yes, sir.
Q. There was no steam to interfere with your view, was there?
A. No, because the steam went down.
Q. I just ask, there was no steam to interfere with your view of seeing into that cab, was there?
A. No, sir.
Q. Or seeing the men when they jumped?
A. Well, there was only one jumped.
Q. Well, the man that jumped?
A. Yes, sir.
Q. The steam didn't interfere with you seeing that man who jumped, did it?
995 A. No, sir.
Q. From the time he leaped from the engine until he landed on the ground?
A. Landed in the ditch.
Q. Landed in the ditch, or wherever he did. After you witnessed this scene, as you claim, what did you do? Did you have any machinery there of your own to look after in the malt house?
A. Well, when I seen the accident I closed off my electricity quick and I come down the electric elevator.
Q. What did your electricity operate?
A. Why, that electric elevator. Operated kiln turners.
Q. Kiln turners?
A. Yes, sir.
Q. And you shut off the kiln turners?
A. Just pulled my switch. That is all I had to do.
Q. And stopped operations in the malting house?
A. Yes, sir.
Q. Then where did you go?
A. I went into the elevator and came right down to where the accident was.
Q. Came down four stories?
A. Yes, sir.
Q. After you got down did you report that you were going away to anybody or tell anybody about the accident?
A. I told Mr. Voltz, hollered out of the door, and went right out.
Q. Where was Mr. Voltz?

996 A. He was just on the same side, only in the kiln dryer fire department.

Q. On what story?

A. On the first floor.

Q. Then you went out?

A. Yes, sir.

Q. You said that the Niagara Falls train came along there, and as I understood you said it came along there—you put it from 5 to 10 minutes, was it?

A. Between 5 and 10 minutes later.

Q. So that after you came down on the elevator and went out where Mr. Kinney was the Niagara Falls train didn't come along until 5 or 10 minutes after that?

A. 5 or 10 minutes afterwards.

Q. How long did it take you from the time you started to get down until the time you reached where Mr. Kinney was?

A. About a minute.

Q. About a minute?

A. Yes, sir.

Q. Are you sure it wasn't two?

A. No, sir.

Q. Did you swear at the other trial it was two?

A. No, I don't think I did.

Q. So that you got down in a minute? Didn't you swear at the last trial that it was ten minutes before the Niagara Falls train came along after you got out?

A. Yes, sir.

Q. Is it your best judgment it was ten minutes?

997 A. I said about 5 or 10 minutes.

Q. Is it your best judgment that it was about ten minutes?

A. She was due ten minutes to 9.

Q. Is that why you say it was about ten minutes afterwards, after you got down, that she came along?

A. That is what I think. Of course I didn't have no watch right in my hands.

Q. That is your judgment, that it was ten minutes after you got there?

A. Yes, sir. Of course I was too busy looking after so as to get some help from Mr. Kinney.

Q. When you got there you were the only man on the spot?

A. Yes, sir, excepting Mr. Sauer. He come and helped.

Q. Where was he when you got there?

A. He was right side of the shed, wringing his hands like this (indicating) after he fell through the wire into the ditch. He caught into the wires.

Mr. Spratt: I ask that the latter part be stricken out. I asked him where he was.

The Court: Strike it out.

A. He was right along by what they call the elevator.

Q. So that he had gone about 150 feet from where the engine lay and was over near the elevator?

A. Yes, sir.
Q. And was wringing his hands?
A. Yes, sir.
Q. When you came down?
998 A. Yes, sir.
Q. I show you a photograph and ask you if that is a view of that part of the Kam malt house where you say you were in the window.

Mr. Ward: Is that the way it is now or it was then?
Mr. Spratt: As it was then. It was used at the previous trials.

A. Right up there, the fourth story. This (indicating) is the terminal room.
Q. Will you take a pen——
A. Here (indicating) is the terminal room.

Mr. Ward: There is a mark here (indicating).

Q. Which one were you at?
A. On the fourth story.
Q. Is that the window where there is a cross there (indicating)?
A. Yes, sir.
Q. And that represents the window where you were at the time?
A. Yes, sir, at the time. Always I swore to that, and I am going to swear to it today.
Q. Because you swore to it before, are you?
A. Yes, sir.

Mr. Spratt: I offer that photograph in evidence.

(Photograph received in evidence and marked "Exhibit G.")

Q. Did you see Mr. Kinney sticking his head out of the cab window?
A. He had his elbow on the window like this (indicating) and had his head out like that (indicating) at the time. He
999 had his elbow on the window frame like this (indicating) and had his head out.
Q. You saw Mr. Boyle, you say, some time after you were out there?
A. Yes, sir.
Q. And how long after you got out there did you see Mr. Boyle coming?
A. Oh, it was about 5 minutes after.
Q. Do you remember of there being a tool house down there?
A. Yes, sir, down here (indicating).
Q. About where was the tool house?
A. Somewheres in there (indicating on map).
Q. Was it somewhere near Hertel avenue?
A. It was on this side (indicating).
Q. Was it south of Hertel avenue?
A. South of Hertel avenue.
Q. And east of the "Y" tracks?

A. It was east of the "Y" tracks, yes, sir.
Q. And that is where you saw Boyle?
A. No, sir, I didn't see Boyle there.
Q. Where did you see Boyle?
A. I saw Boyle here, right up there (indicating).
Q. You saw Boyle——
A. Right after the accident right up here (indicating). Here is the malt house right in here (indicating). Right there (indicating). I see Boyle coming up after the tank, right back of the tank.
Q. From back of the engine tank and coming up toward the engine?
A. Coming towards the tank at the time.
1000 Q. Did you know tht Boyle had been down to the tool house trying to get jacks to lift the engine at that time?
A. He couldn't. He didn't have time to.
Q. Did you know?
A. No, sir.
Q. You didn't know?
A. No, sir.
Q. You swore that you saw no lantern on the caboose? You swear to that positively—that night?
A. I didn't see no lantern.
Q. Did you see any lantern on the engine?
A. No, sir.
Q. But you do swear that you saw Kinney distinctly and you saw Sauer distinctly on the engine from where you were?
A. Yes, sir.

Mr. Spratt: That is all.

Redirect examination.

By Mr. Ward:

Mr. Ward: I want to read this testimony which you read part of. Mr. Freeman this testimony that Mr. Spratt read, as follows:

"Q. How many men were in the cab? A. I didn't see nobody. Q. Didn't see nobody. Could you see Mr. Kinney? A. Yes, sir. Q. Did you see Mr. Kinney? A. Yes, sir. Q. Where was the fireman? A. The fireman stood on this side (indicating). On the same side that the engineer did." Did you answer that?
A. Yes.
1001 "Q. Did you see anybody else?" And did you answer "No, sir?"
A. No, sir.
Q. Did you keep your eye on that engine when it tipped over?
A. Yes, sir.
Q. Did anybody get off of it afterwards?
A. Only Mr. Sauer, tht is the only one I see.
Q. Were you looking at it when it was tipping over?

A. Yes, sir.
Q. And did you look at it after it tipped over?
A. Yes, sir.

Mr. Ward: That is all.

Recross-examination.

By Mr. Spratt:

Q. While you were going from the window down in the elevator to the foot, and before you got outside the building, there might have a dozen men got off that engine if they had been on there, couldn't they?
A. They couldn't.
Q. Without you knowing it?
A. No, sir, they couldn't.
Q. They couldn't? That is your answer? Didn't you swear at the other trial that it took you two minutes to get down there?
A. I might have.

Mr. Spratt: That is all.
Mr. Ward: That is all. No further rebuttal.
The Court: Evidenc closed.

Mr. Spratt: I again move to strike out the testimony of
1002 those same witnesses that I objected to, and ask that their evidence be stricken out, and I have forgotten whether I mentioned the name of a man named Barry, and I ask that his testimony, in addition, be stricken out.

The Court: I will give you an exception, and deny the motion to strike out any of the testimony.

Mr. Spratt: Exception. Now, if the court please, I move for a direction of a verdict of no cause of action on the ground that there is no evidence in the case of any actionable negligence on the part of the defendant that can be considered either the proximate or concurrent cause of the accident, but the plaintiff is guilty of contributory negligence as a matter of law; and also that by his previous knowledge of the conditions which existed prior to the time he passed dwarf 6 he assumed the risk of the collision as a matter of law; and also upon all of the grounds that I moved for a non-suit.

I also move that the plaintiff now be required to elect whether he now seeks to recover under the Federal Employers' Liability Act on the ground that he was engaged in interstate commerce at the time of the accident, or whether he now seeks to recover under the New York State Employers' Liability Act, under his notice, which is in evidence.

1003 I also move to strike out the notice under the State Employers' Liability Act on the ground that if the case is to be submitted to the jury under the Federal Employers' Liability Act the latter Act is exclusive, and the case cannot be considered under both acts at the same time.

The Court: I will hold with you that if the case can be considered

under the Federal Liability Act that the Federal rules are exclusive. But I will deny your motion, in fact all of the motions, because I intend to submit all of the questions to the jury. I am going to submit the question to the jury whether or not this man was acting in interstate commerce. Of course that would have a bearing upon which set of rules of law would apply in this case.

Mr. Spratt: I take an exception to your Honor's ruling. I want to ask the jurors a few questions. I see that Mr. Irving Cole has been sitting with you, Mr. Ward, during the trial. Is he associated with you?

Mr. Ward: No, except that Mr. Cole has taken a great interest in this case, and at my request has furnished me with some briefs.

Mr. Spratt: Are the jurors acquainted with Mr. Irving Cole?

Mr. Ward: I do not think this is any time for further inquiry of the jury.

Mr. Spratt: I saw him consulting with you, and I assumed he was helping you in the case.

1004 Mr. Ward: Only at my request he has briefed up some questions of law in this case.

Mr. Spratt: As long as the jurors are not interested in him I haven't anything further to say.

The Court: I will repeat what I said to you before, that I shall require in this case that under the rule, which I have the right to enforce, all requests to find must be submitted in writing. And I will state also that any requests to charge submitted after the charge must also be submitted in writing. This is a very important case, and I am very anxious to avoid any possible errors in my charge to the jury. Therefore I will ask the counsel to observe that rule.

Mr. Spratt: Of course, your Honor, we cannot tell what your Honor's charge will be until it is made. I will submit them in writing if you can read my writing. I think though you would rather have my oral requests if you have to read them.

The Court: Well, I feel that you will have to submit them in writing.

Mr. Spratt: I will do that.

(Adjournment until Thursday, February 6, 1919, at 10 o'clock a. m.)

Proceedings of Tuesday, February 6, 1919—10 a. m.

(Mr. Spratt summed up to the jury.)

(Recess until 2 o'clock p. m.)

1005 After Recess—2 o'clock, p. m.

(Mr. Ward summed up to the jury as follows:)

GENTLEMEN:

Nearly 25 years ago Mr. Spratt and myself, when we became members of the Bar, undertook the obligation, as we understood it,

of upholding the laws of the land, and supporting the Constitution of the United States, and when the old presiding Judge of the Appellate Division, or the General Term as it was then, called the young lawyers before him he told us that we should support the cause of our clients to the best of our ability, irrespective of their position in life. He told us that the poor man had just as much right before the law as a rich man, and that no lawyer who had any regard for his profession should make any distinction in the discharge of his duty in that respect. It has fallen to Mr. Spratt in this long and protracted litigation to represent the greatest corporation in our State. He says it is a corporation that does no wrong. It has fallen to me to represent a poor, common, human being like the rest of us, who makes mistakes. That perhaps is not any more than human. So we come down to you after ten years. I know you are tired of this lawsuit, and yet what do you think of Kinney?

1006 Long after his slender savings had been expended he supported the burden of this litigation as well as he could against the New York Central, and comes today finally before you with a lawsuit that has become historic in the annals of this county, comes here today before you with the law, as his Honor will lay it down, established in this lawsuit in every court of this state that he has a right to have a jury find a verdict in his behalf. And that is the law as his Honor will lay it down to you and which has, after ten years of work been laid down by the courts for you. They have been long years to him. Six times on the witness stand, a day at a time, never would read his testimony over. I have seen the effect of the years on him. He isn't as clear, he isn't as firm, somewhat of a broken man, and yet if his word spoke to you the accents of truth you know it. I can't persuade you. If they didn't speak to you the accents of truth you know that, and Mr. Spratt can't persuade you; and that is the fine thing, you know, about our Anglo-Saxon system of jurisprudence, that it doesn't let the lawyers decide the facts of the lawsuit. It doesn't let the judges decide, however learned in human nature and in the law they may be. We can't decide the facts. They don't pick out all farmers, they don't pick out all manufacturers, and they don't pick out all business men, but a jury

1007 is composed of twelve men of varying walks of life. It is not a machine that grinds out justice. The reason jurors are picked out from the varying walks of life is because this man has had that experience in life, and that man has had that experience in life, and when you get together you add the sum total of your various experiences to help you reach the truth.

Now, you know, gentlemen, evidence is not the spoken word of witnesses. That is only a small part of the evidence. It is not the spoken word of witnesses. Otherwise, the administration of justice could be reduced to a mathematical formula. The fellow that had the most witnesses would win the lawsuit, and with a railroad as long as the New York Central I presume there would only be one result in any litigation that was brought against it, on that principle. But evidence is made up of two things what the witness says and your judgment about the probabilities. Some of you know Judge

Lambert. Judge Lambert said "If somebody came and told me that there was a flock of ducks down in Jamestown outlet I would say that is reasonable, I would believe it, but if the whole City of Jamestown told me there was a flock of turkeys swimming down in the Jamestown outlet I would know they were all liars." So that when you approach the consideration of a question of fact you not only listen to witnesses, but you say "Is that story probable?"

Now, Brother Spratt says that this plaintiff did this. He
1008 says he was an experienced engineer without a mark against him, a man that so far as any records have been disclosed here had never committed any breach of duty. He was charged with the duty of operating this switch engine on this occasion, and he had not only his own safety at stake, but the safety of others. He says that with that responsibility resting on him he went down this track, he went by a signal set against him, that he was heedless of a stop signal given by the brakeman on the head car and refused to heed the words of warning of a man that stood within 18 inches of him and kept repeating to him that he was doing wrong. That is what Mr. Spratt says happened here. Search out your recollection of men and affairs, and see if you ever heard of such a thing before. A man concededly sober, concededly competent, concededly in the possession of all of his faculties, and Spratt says that he could bring enough witnesses to swear to make you believe that thing. And he concludes his argument by saying that you must not put a premium on negligence. That is right, and you must not put a premium on perjury. And if you haven't heard perjury in this lawsuit you never heard it. The key was put in the lock by Doud, who told something here on the stand that I didn't know about. I knew he was a discharged employee of the New York Central, and Spratt proved why.

He went down to take some pictures where they had cut his
1009 father's leg off, his own father, and they discharged him. Gentlemen, is there a club over these witnesses? You take a railroad man that has worked up through these various grades of seniority from an extra brakeman, and got to be an engineer, and earns $200 or $250 a month, is there a club over him? And when a man like Keck or Charles Kinne has got the courage to walk up here to testify against their employer, as those men did, the club don't always work. This lawsuit started long before John Kinney walked into my office on crutches six months after this accident and told me a story, and after a long time persuaded me to bring the action, because I had experience enough to foresee the difficulty that was going to confront that man, because, as Spratt says, so far as the spoken word is concerned he stands perfectly alone. And as he talked of it to me and explained it to me I said to him, as I said to myself, "Turkeys can't swim. I will take your case to court." You know this lawsuit commenced long before that, and that is the whole trouble here. Those aren't bad men, Boyle, Reithenburg and Mullen. They are not bad men as men go. They thought Kinney was dead. There he lay down under that overturned engine. There

came there their superior, who has not appeared in this law-
1010 suit. They were summoned up in the tower, and here are three trains wrecked in front of this tower. Who is to blame? That is what that man is there to find out. In 1908 you know there weren't many jobs around then. Who is to blame? Is Mr. Mullen to blame? Mr. Mullen says he isn't. Is Mr. Boyle to blame? Mr. Boyle says he isn't. Is Mr. Reithenburg to blame? Mr. Reithenburg says he isn't. Is Mr. Sauer to blame? "No," says Mr. Sauer, "I am not to blame; there is the fellow. He is dead down under the coal" and while the caboose was burning up and the city firemen were trying to get John Kinney out they were writing out statements, statements from which those men, no matter how much their conscience pricked them afterwards when they found Kinney was alive and clamoring for his rights and for a chance to be heard in his behalf, and for the right to speak for himself and his wife and his children, they couldn't go back on them. That man Mullen always seemed to me like a nice man, I don't believe Mullen would ever have made that statement in the tower unless he felt that when you put the burden on a dead man nobody is harmed. I want to get you into the atmosphere of ten years of litigation. I want you to realize that every fact that Kinney has been able to prove here has been dragged out of
employees of the New York Central. Do you realize that?
1011 Take that list of witnesses that I will hand you, with the permission of Mr. Spratt. Look at these witnesses that were sworn by the plaintiff to make out his case. You know you can't force the other man's employees to commit perjury in your behalf. Out of the mouths of unwilling witnesses, George Schultz, present yardmaster and conductor of the Michigan Central, one of the allied New York Central lines, is our first witness. Our second witness was the Custom House man not connected with the railroad. Our third witness was Doud, and then Barry, no longer connected with the railroad. Our fourth witness was Mr. Kinney himself, and then I had Peck, their crack engineer, the fancy engineer of the New York Central system, who handles the superintendent's car. Mr. Spratt suggests that he is coming up here and give testimony unduly favorable to this homeless and helpless fellow against his employer. Charles N. Kinne another New York Central engineer at the present time employed by them. John J. Dorgan, whose testimony was read, but who when he testified was in their employ as an engineer. James A. Ross, discharged, they say. He told Kinney that that piston was cut. Carroll says "I don't remember." Ross was discharged and Carroll wasn't. Did you have anything to do with this lawsuit? I
don't know. I don't suppose they told him that was the rea-
1012 son. John McMurray, their boiler foreman now. James Cunningham, their roundhouse foreman now, and Joseph Sullivan, their boilermaker now. And out of the mouths of those men on the payroll of the New York Central we have had to build up our lawsuit; and, gentlemen, we haven't produced new witnesses ten years afterwards, and that is why I say gentlemen, and it has a harsh sound, but there are times for plain speaking, don't put a premium on negligence and don't put a premium on perjury.

And now I want to discuss with you with some particularity the grounds of liability that I claim exist against the New York Central. This action, as Mr. Spratt has indicated to you, was originally brought under the State Act, which is in many respects the old common law which we acquired from our English forefathers; and under the rules of the common law if a man was one-third to blame for an accident which resulted in his injury, and his master was two-thirds to blame, nevertheless the man could not recover. That was what was called the doctrine of contributory negligence. And the first three trials of this action were conducted under that condition of the law, that if Kinney was in any respect to blame, no matter how negligent the master was, Kinney could not recover. And finally
the law in this case was settled by the highest court that it
1013 was for the jury to say under all of the circumstances in the
case, whether Kinney was to blame in any respect, and that the jury had a right to say from the evidence that he was not to blame in any respect. This accident happened in October, 1908. In April of that year the Congress of the United States, in response to the demand for general uniform legislation for railroad employees, passed what was generally known as the Federal Employers' Liability Act, which related to railroad employees. Congress had passed an Act two years before which had been declared unconstitutional by the Supreme Court of the United States, and this act of April, 1908, was almost exactly the same as the act which had been declared unconstitutional, and many lawyers, myself included, supposed that this second act would be declared unconstitutional. The language was general. It merely said that when the railroad and the man were both engaged in interstate commerce then certain things followed, and among the things that followed was this (that is where it became very important in this lawsuit)—Congress said this old common law rule of putting the whole burden on the fellow that gets hurt, when he is only partly to blame, we are going to abolish that, we are going to divide the damage. If the blame is divided we will divide the damage. And then Congress said further that the old
rule that on a railroad if a man is injured through the negli-
1014 gence of a fellow servant there can be no recovery is wrong,
because that rule came from the days of the blacksmith shop and the shoe shop, when the master was always present, just like a man on the farm with two or three hired men and one boss. But a great corporation, which has a Board of Directors sitting in a bank perhaps in New York City, we can't make that rule that they must personally be negligent. We can't release them because their conductor or some signalman is negligent. That wouldn't be just. Modern conditions have changed that rule, and so we will hold the railroad companies for the negligence of fellow servants. So that the two things that that law did, the two important things so far as they affect this lawsuit, were to provide that where the fault is divided the damage is divided, and where a railroad employee causes an injury to his fellow employee the master is responsible for that. Finally the courts began to, what we lawyers call, construe that United States Act. That is, say what it meant. At first a man was

held to be engaged in interstate commerce if he was actually operating a train in which there was a single car or a single piece of interstate express or freight. And then after awhile the courts held that if he had orders to go and get such a car, or go and get such a train, he was engaged in interstate commerce. And they further
1015 held that if it should appear in a lawsuit that there was interstate commerce, and the plaintiff hadn't claimed under it, he would be thrown out of court. So that it became necessary for Mr. Kinney to amend his pleadings and allege that he and the railroad company at this time were engaged in interstate commerce. Whether he could make that proof or not he didn't know. And so that question was finally settled. His right was disputed by my friend, and finally the highest court to which that question could go, decided that Kinney had a right to recover if he could prove interstate commerce under the Federal Act, and so we come down to you for you to decide two questions. Were Kinney and the railroad company engaged in interstate commerce at this time? If they were, then the case is under the Federal Act with all the things that follow it. If they were not engaged in interstate commerce it is under the State Law.

Now, in the orderly way in which this subject should be discussed, I would like to take up with you the proof as to whether or not Kinney was engaged in interstate commerce, because I assume that his Honor will ask you to make a separate finding on that. Now, in that respect, of course, it has been necessary for us to make our proof in part, at least, from the employees of the defendant. First let me speak about the general conditions there at Black Rock at
1016 that time. Of course our main New York Central line runs from here to Rochester. In order to handle that business out there in Black Rock they have got a yard out there in that section. These men have told you that there is local business there, as well as the business that comes across the river. Mr. Mullen, the United States Custom officer, said that there are eight or nine hundred cars a day each way across that bridge and that 30% of those cars were Michigan Central cars. You see that means about 66 cars a day, two or three hundred cars each way a day, to be taken over the bridge or turned over to the New York Central. Six hundred cars a day is a lot of business. They have got to be put somewhere. The New York Central brings them down here and leaves them. The Michigan Central brings them there and leaves them. Those that come across the bridge have to be taken care of by the New York Central. Now, where do they put them? Now, I have sworn the Michigan Central yardmaster. Don't forget that, gentlemen, the man who is the yardmaster at this time for the Michigan Central at that place, and he is now a New York Central Lines' employee. Then that fellow Schultz that I brought here. He has got no interest in Kinney. Don't forget that. He is here giving testimony because he has to. He says there were three tracks there at that time, called, the
1017 fence, the coal and the middle, and those tracks were used exclusively for interchange business, and he says the maintenance of those tracks was paid for by the Michigan Central, because

he handled the bills, that the section foreman of the New York Central would do the work, and they would turn the work over to him, and he sent them over to Victoria. Has anybody contradicted that or disputed that? He has done a lot of talking about it, but they have tried to beat the evidence and dispute it? And there is a man on their payroll that gave that testimony. Then I swore Doud, who had been a New York Central yardmaster in charge of the other end of the business, who says the same thing. Kinney says he was running in and out of that yard frequently, taking trains there and drawing them away, and always he took the trains there that were due to Canada, and that the trains that he drew away were from Canada. Counsel talks about local business there. There was local business there, and they had tracks over here called the local tracks where there were scales, because local business has to be weighed in order to find out what the freight was. I have no doubt that sometimes local freight might get over on those tracks. I have no doubt about it, but can you conceive it possible that on this night
1018 these tracks that were exclusively used for interstate commerce from the bridge and back happened to contain every single car that was purely local, not one from Canada and not one going outside the State? Is it possible? Because if there was a single car that Kinney was going to get, a single car that had come from Canada, or a single car destined for a point outside of the State, in that whole train, his Honor will tell you that Kinney was engaged in interstate commerce. Now, the most that Brother Spratt seeks to prove by the men that he has brought there is that sometimes local cars got on there. He has never proved a local train. Dehn started to swear that once he had heard there was a train of grain there. The court struck that out. Now, you gentlemen know and I know that there are shipping bills for every train that is there, and conductor Mattern had his hands on those shipping bills that night. Spratt says they are destroyed, but has anybody sworn they were destroyed? We have asked for them, and when they produce them, if they ever produce them, and we found a single car or a single piece of freight in a car that had come from Canada, or was destined for a point outside of the State of New York, that fixed Kinney's status. Where are those bills? You can't be content with the counsel's statement that they are destroyed, because he could prove it if they had
1019 been destroyed. He says there is a rule that allows the railroad companies to destroy them. Where is the rule? Here is their office right here in the Iroquois Building. You can't decide this case on loose talk if evidence is available. We have asked for those bills, and, well, stop and think about it, gentlemen, every step of this lawsuit from the time it started ten years ago, any paper that would be of service to Kinney, have they found it? It has disappeared, burned up. Any paper that may be of service to the railroad company is produced here. Where are those payrolls? Remember, they produced the payrolls. The payrolls showed that Kinney was getting less than what he thought he was getting, and Spratt made a great plea what a liar Kinney must be because he would remember what pay he was getting. Isn't it funny that those payrolls didn't

get burned up? It was a strange fire, wasn't it, that would burn up all the records that were favorable to Kinney and wouldn't burn up the records that were not favorable to him? So there is the situation with this question of interstate commerce. I have proved to you by the yardmaster on their payroll that had charge of that business that those tracks were kept up by the Michigan Central; that they were exclusively used for this business. I have proved to you that there was such a volume of business that the three tracks would
1020 hardly be sufficient, and they haven't shown but what this was the first train to go off that track that day. And when they brought Mr. Bronson here, and he was in there after a train on the next track, what did that turn out to be? A train from Canada. Helpless. Now, that is the evidence on that subject. Mr. Mann says that there was a verbal agreement that they should divide the expense on these yards here, and that 8 or 9 per cent or 10 per cent was the share of the Michigan Central. I suppose that would be just about the proportion that those three tracks bore to the rest of the yard. And when you consider it remember that they haven't disputed the statement of Mr.—whatever his name was—that he handled the actual bills for the repair of those three tracks and those were paid by the Michigan Central. If this was interstate commerce, if Kinney was engaged in interstate commerce, if there was anything in that train that he was going to pull out that night that had come from Canada, or a single car that was going to some place outside of the State, then there is no use of my talking about the liability under State Law here, because you have to decide the case under the Federal Law. But still you might find otherwise. You are the triers of fact, and not myself. So that it will be necessary for me to discuss the liability under the State Law to some extent, and I would rather do that first.

1021 Now, what is the defendant liable for under the State Law? He is liable for three things, as I view it. He was liable for furnishing Kinney with a leaky engine that prevented his observing the condition of the signal at the moment of passing. He is liable for negligence on the part of the towerman, because we had a state law that made the towerman stand in the place of the master. So that even under the state law we are not liable for anything that Reithenburg did, and if there was any defect in the signal the railroad was liable under the state law. Now, the state law said that whenever a locomotive leaked steam so as to obscure the vision of the engineer it must be taken out of service. That was the law of the State of New York at the time this thing happened.

Now, let us see about this locomotive. We managed to get these three comparatively harmless reports and remember we asked for these reports before the famous fire. The fire didn't occur until after the first case was tried. They furnished us with these three reports, and when we came to examine these three reports, one made on the 1st of October, one made on the 4th of October, and one made on the 5th of October, each by the engineer, we find that he reported that engine leaning steam always at the same place. You will have these to examine. Always at the same place in about

five or six different particulars, and down here (indicating)
1022 Engineman Fox on the 1st says "Repaired jacket under boiler in addition to other leaks", and on the 4th Engineman Ames says "Caulk leak under belly of the boiler." Now, who fixed them? We couldn't get the report of Charles Kinne. That is funny, the disappearance of that report of Charles Kinne. We couldn't get the report of Dorgan, the man who handled it the very day that Kinney took it out. Kinney heard about those men and they were subpœnaed into court. Remember, all the time those men are working for the New York Central. And what do we get from Charles Kinne? That engine leaked steam so that it obscured signals and he reported it. Just what the railroad says shall make them take the engine out of service. Did they do it? And then two days later Engineman Dorgan took the same engine out and found it leaking in the same place, and reported it as obscuring signals, and he brought it in on the morning that they turned it over to Kinney. He brought it in in the morning and they turned it over to Kinney at noon. Now, I brought all those foremen and assistants up here to see if I could find who had repaired that engine, and in doing so I discovered from Sullivan that on the 6th of October that in addition to the things that these other fellows
had reported that engine had 15 of the flues with the beads
1023 off. Now, for ten years have they had a chance to find the men that fixed that engine, and they close their lawsuit by swearing Schwartz and Kreiger, who did just one thing. They took the packing out of the left hand piston cylinder and put it back again, the two men that Ross says reported to him that they had done as good a job as they could. If this engine was being repaired for the defects that those five engineers reported who did it? They know. Their records show. Why don't they bring their men here? Now, Spratt says that was a good engine, here was a big road engine, for after these enginemen had reported leaking steam so as to obscure vision they were using it in yard service. Was there a shortage of motive power in 1908? Should Kinney have refused to take that engine out? Well, let us judge that. Let us judge that by what the other men did. There are five engineers who had that engine before Kinney. There are five engineers who complained of it leaking steam, and two of them said that it obscured their view of signals, and everyone of them completed their run. Now, what was expected of them? Or would they have been fired if they had refused? And what happens to Charlie Kinne when he brings that engine in? Do you remember his testimony? The yardmaster said to him, "Turn it around and run it backwards to
Black Rock and bring another train back." And he did it.
1024 And Spratt says that when Kinney found this engine for the first time leaking steam so as to prevent his seeing signals, and he was on that track, that he should have jumped off the engine, left it there. Would that have been a safe place to leave it? The most they claimed is that he should have taken it to some siding. Was there a siding up here? Plenty of sidings beyond, no siding there. The commencement of the counsel's argument, it seemed

to me, was illogical. In the first place, he told you that it was Kinney's duty to take this engine in when it leaked steam, and then he told you that all the rest of the train crew testified that it didn't leak steam. Did it leak steam so that Kinney should have turned it in? If it did, why does Mattern and Boyle and Mullen swear that they didn't notice any steam leaking from it that would interfere with a view of signals? And that is the testimony of his witnesses. You can't blow hot and cold on the same proposition. Either that engine leaked steam so badly that they shouldn't have used it, and if it did somebody would know it beside Kinney, or else it was a condition just as Kinney explained it. When he took it down to Tonawanda he says when he was pulling a heavy load it leaked steam. That was in the day time. He says he had some trouble seeing dwarf signals there. He was able to see them, but it made him trouble, and then it didn't bother him again all
1025 day until he had his heavy load that he brought over from down here that started the leak going again. I suppose an engine labors harder when it is pulling a load. You gentlemen know that better than I do. Spratt says why didn't he take hold of that train and pull it backwards to Black Rock just as Charlie Kinne had done the day before. Has Mr. Spratt forgotten that the yardmaster gave Kinney orders to turn that engine around? Kinney supposed, of course, that is what he was going to do. He saw no reason why he shouldn't back up to Black Rock and he started down here with the full belief that he was going to nose his engine in on that train and back up to East Buffalo. Who caused the turn around the "Y"? Did Kinney pick it out? Isn't the evidence undisputed that the yardmaster gave the order to the conductor, in the presence of Boyle, to turn the engine around on the "Y", and when Boyle got down here he told Kinney? A fine engineer he would be wouldn't he, to disobey those orders and say "I know more about it than the yardmaster does." And it is the little things, you know, that count the most sometimes. You see if they had sent them around —of course I don't know that anybody could be blamed particularly for that—but it just shows how it happens. But if they had sent him around with the current of traffic the accident would never
1026 have happened. He would have had his arm signals, it would not have been obscured by the steam, and he would have been all right. They sent him around against the current of traffic. He didn't know which way he was going to be sent. He didn't know whether his movement was going to be governed by a dwarf down on the ground or a high arm signal until he got the evidence from the tower. Supposing the railroad had just had that crossover there—Mr. Whiting understands what that means—supposing they had had that crossover there, then they would never have had to send Kinney by that dwarf also. They would have sent him on the right hand track all the way, with his movement controlled by the high arm signals, and he would have gone out there and about his business, or been stopped by a high arm signal. He didn't select those things, gentlemen. Kinney didn't determine that there should be a crossover there. Kinney didn't determine

that he should go against the current of traffic. He went there like a soldier, because he was ordered, and that they blame him for.

Now, he gets down here, with Mr. Mullen on the front of the caboose, Mr. Boyle, last seen south of the Military road. You notice that Mullen won't swear that he saw Boyle get on the engine.

That is the reason I always thought Mullen wanted to be a
1027 decent fellow. Nobody ever put Boyle on that engine but Boyle. Stop to think. Of all the witnesses that have been brought here in this lawsuit did anybody see Boyle on that engine but Boyle? Here is Keck who says he was looking down here, here is Reithenburg who says he was looking down and saw these men jump. Reithenburg didn't see Boyle get off that engine. Keck didn't see Boyle get off that engine. Not a soul. Now, I tell you my friends, if the New York Central Railroad Company has got Boyle to swear he was on that engine when he wasn't they are safe in beating Kinney. That is why I tell you that there must not be a premium put on perjury. You saw that man Boyle on the witness stand. You heard his story. Now, think what story that man told you. "I knew that light was against Kinney. I knew he was running by it. I stood at his elbow, I spoke to him." This man was promoted to fireman a little while afterwards, and knows how to stop an engine. You can't make me or you believe that he didn't know how to stop an engine. "I knew he was running out in the path of the passenger trains." You see Boyle admits he knows all these things that Spratt claims that Kinney ought to have known. Spratt says that Kinney is the most reckless and negligent man in the

world because he did this. Why, Boyle stood there beside
1028 him and Boyle says he knew he was doing it. Now, think of that man's story under oath, that could take the rights away from that poor devil who has lost his legs. "I was standing in the gangway within 18 inches of Kinney", he says, "I noticed the dwarf set against him when he was a car length over Hertel avenue" he says, and here is a curious thing in his testimony. He first says that Mullen was swinging him up two car lengths from the dwarf. I had the stenographer transcribe it. Just let me read it to you: "Q. Now, as you proceeded along there, did you notice Mullen give any other signals after the come-ahead signal you have described? A. I noticed Mullen give—swing him up when he got about, I should judge, a couple of car lengths from the dwarf."

Whatever Kinney knew, Boyle says he knew the signal was. Whatever Kinney knew, Boyle says he knew Mullen was trying to stop him. What would a man do under those circumstances when he saw an engineer apparently losing his mind? What does Boyle say he did. Turkeys don't swim. What does Boyle say he did? He says he spoke to Kinney, he saw that Kinney didn't heed him and then to make sure he got down on the step and lowered his lantern and examined the arm on this dwarf. He was sure

about this light, but he got down to examine it. Did you
1029 notice that Mullen said the same thing. Mullen said he was sure about the dwarf, but he got down and examined it with the lantern. Boyle says after he did that that he got here

close to Kinney, as close to Kinney as he stood to the stenographer. You will remember I called his attention to it. He got close where he could reach the apparatus that stopped the engine, where he could reach over and touch Kinney as I can touch Mr. Abbott, and there they had sixty feet yet to go, eighty feet—eighty-seven feet from the dwarf to the frogs, sixty feet to the fouling point, he knew this caboose was passing the dwarf and after the caboose with its 36 feet of length passed the dwarf, then 36 feet of the engine had to pass the dwarf before it got to Kinney, and Boyle knew that it was going out on the track and he knew that passenger trains were coming. And then the collision occurred, and somehow the fireman escaped over Boyle, and somehow Kinney rolled around over Boyle, and still Boyle stayed there in that little 18-inch gangway, and no man saw him. Now, gentlemen of the jury, can a man tell a tale like that in a 20th century courtroom and get away with it? Can a defendant produce a witness who tells a story like that and retain your confidence? What kind of a defense is it that needs that sort of support? Is it an honest, high toned defense, or is it one of these old railroad defenses that, thank God, are getting scarcer since the Government took control?

1030 It this an echo of the past? Well, Kinney comes down to that dwarf. What were the railroad laws and obligations that Kinney was under then when he came down toward that dwarf? What were his duties? That is the important thing. What were Kinney's duties as an engineer? Of course everybody seems to agree that when you push cars it is necessary to put a man on ahead to tell you where the cars are going and what is ahead of you. There must be some things that the engineer can see. There must be many things that he can't see. If you are going around a curve, for instance, you couldn't see a dwarf. The dwarf would be on the other side. If you are pushing a long string of cars and there happens to be a snow bank there or a building intervening, or any of a half a dozen things, he cannot see the signal when he is pushing the train. Mr. Whiting knows more about that than I do. The rule provides that the brakeman shall take a conspicuous position on the front of the leading car. Nobody claims that Mullen was not an experienced brakeman. It was Mr. Kinney's first experience with him, but nobody claims he was not an experienced brakeman, so Mullen takes this conspicuous position on the front of the leading car, and he is equipped with a white light and red light. The first thing he does is to take and set that red light inside the door.

1031 The whole front of that caboose is not any wider than here (indicating), and here (indicating) is your door. It was his business to have that red light where he could reach it. That is what that red light is for. Another curious thing, no air connections between this caboose and the engine. I don't know whether Mullen connected it up or not. He doesn't tell us. Of course if he had he could have controlled the starting and stopping of that engine just as well as Kinney. And they start off, Mr. Mullen in command, Kinney and his fireman charged with the duty of calling signals to each other. And here is the rule which

says—and Reithenburg has made it stronger than the rule. You will see why Reithenburg did that in a minute. I will point it out to you. The rule says that if you give a man a signal you can't take it away from him until he stops. I am not quite correct. You can take it away from him in an emergency, but you can't change the switches or permit a movement on a conflicting track. Find me that rule, Mr. Flynn, because I want to read it exactly, because that is the whole turning point of this lawsuit. Now, if that was the rule then Kinney had a right to rely on it, didn't he? It reads "If a signalman has prepared for an approaching train, and it is found necessary to stop them or change the position of the switches or signals to give another route, the signal must be set at
1032 danger, but no switch change or signals given to a train on a conflicting route until the train that first had the right of track has come to a full stop." That is the rule that Kinney had a right to rely on. That rule told him—and Reithenburg says so—you will remember his testimony—that rule told Kinney that if he saw that dwarf change as he was approaching it, they must not permit any movements on these tracks until he had come to a stop. He might delay things a little bit, but that is the worst that he could do by going on, because they must know that he had stopped before they let any other trains come on. Kinney says he saw that signal green about at the point that Mr. Spratt indicated. It wasn't so far to see, you know. This fellow Bronson down here (indicating) could see a little further than that. It wasn't so very far to see. The rules of the company said that the fireman and the engineer must call signals to each other. I suppose that is to prevent just such a thing as this. A man might see a signal wrong. I don't know whether green and purple are very good colors or not. I noticed the Lehigh Valley man said they had white and purple. It seems to me that green and purple are pretty close together, especially if there is any thick fog or steam or anything of that sort to look at them through. And so to make it as safe as possible the railroad men were to call the signals to each other.
1033 Now, did Sauer do that or did he disobey the rule? This fellow Boyle says Sauer didn't do it, actually said so, said that Sauer didn't do it. Kinney says that Sauer did do it. Kinney isn't blaming Sauer. Kinney says that Sauer called the signal green to him when he saw it green, and that after that—you can see how it would be, the train going 5, 6 or 7 miles an hour, 5 to 7 miles an hour I think the testimony is, with a 9 or 10 mile breeze across here, just a little faster than the engine, and coming a little under the engine, just carrying that steam from the piston rod and the leak in the belly of the boiler so that it would rise and go ahead in front of the engineer, the first time that that particular combination of circumstances had arisen, a dwarf on the right and the wind from the left, a thing that would cure itself in a moment because that was the only dwarf signal on the whole trip. A thing that made no difference if it was true that Kinney saw the green light, a thing that made no difference if Mullen was giving honest signals. If a snow bank had been there or a building where Kinney had been

backing up, and been on the other side of the engine, it would have been the same thing. He had the same right to proceed in reliance upon the same signal. That is what these New York Central engineers have sworn to, and you heard it, and Spratt
1034 couldn't get them to go away from it. And when he tries to produce some other evidence what does he do? He goes down and gets a Lehigh engineer and an engineer from Hornell, with a thousand competent New York Central engineers on their payroll right here in Buffalo. Is there one of them that would come here and swear that Kinney didn't have a right to do just what he did do that night? If there was one of them wouldn't Spratt have had them here? Would he have gone down there to Hornell to get that very nice gentleman who wouldn't swear to anything after he got here?

So Mr. Kinney starts down toward that dwarf and a collision occurs. What made it? You would like to know what my theory of that is. You would like to know my theory of what happened there, and I can't tell you. I can't tell you what happened there. There are several possibilities. I want to point them out to you as they have been drawn from the evidence. This little Reithenburg is a smart little fellow. You could see that when he was on the witness stand. He was the judge by which trains were put ahead. He was the boss. He could say that Kinney would go ahead and he could say that the other trains would go ahead. Of course he had to let Kinney out to make that turning movement sometime, and it was his duty there, I suppose, to keep traffic moving along as
1035 rapidly as he could consistent with safety. Now, the first signal that he got was a signal that there was a train coming five miles away, and do you remember—it kind of put me on the track of the idea that I am going to give you—do you remember what a job I had in getting him to admit that it was the same signal for a freight train as for a passenger train? At first he claimed that he got a different signal for a passenger train, and he knew this was a passenger train, until I showed him what he had sworn to before. Then he backed up and he said it was the same signal, but he thought it was a passenger train because a passenger train was about due. That train was about five miles away when he got that signal, quite a ways. Here less than a quarter of a mile away was Kinney. He says he first got that signal for the Niagara Falls train, and then he got the request that Kinney proceed up to dwarf 6. Now, gentlemen, suppose Mr. Reithenburg hadn't had any notification what would he have done? It takes 17 seconds to fix those switches and signals, change them from one position to the other, according to their own proof. Seventeen seconds! Now, what would Reithenburg naturally do if he knew there was an engine that wanted to come up there and turn around and get out of the way as quickly as possible, something that they didn't want to have long on
1036 the main tracks? Wouldn't he naturally start to set up the signals that took him 17 seconds to set up, wouldn't he naturally start to set them up for Kinney? Now, according to the way that thing works the last signal that would be set up would be the

green light. Everything else would have to be set up first. He would have just about time to do that while Kinney was going from Tower I down to where he saw that light. And then you will remember Reithenburg said after he gave Kinney the signal to proceed up to dwarf 6 then he got an announcement that No. 3 was coming. There was a fast passenger train, important that it should have a clear right, important that it should not be interfered with by a switch engine. What would be the natural thing to do? What is the natural thing to do? Wouldn't it be the natural thing to do for him to give the passenger train the right of way and take it away from Kinney? Now, of course there was that rule that Kinney had a right to rely on, that they wouldn't change the switches until Kinney stopped. But supposing Reithenburg said to himself "Here comes a switch engine, they have got a man on the front end and they can see these signals all right (he didn't know anything about leaking steam, of course),
1037 they can see these signals all right. I have no business to hold up a passenger train. Seventeen seconds will affect the whole change." And do you notice a little significant thing? That young fellow had left his instruments and had left his levers, and was standing in the door of the tower watching as these two trains came into view. Of course this malt house here would prevent him from seeing whether Kinney stopped or not. He wouldn't know whether Kinney had observed that change of signal, and suddenly he sees Kinney coming up around this obstruction about half-way, he says, between the dwarf and Hertel avenue, and here (indicating) is the Michigan Central train at Hertel avenue. Is that the way it happened? Now, there is another thing that corroborates that view. It is not in a sworn opinion but it is in the curious circumstance that probably you have thought of. Here was this No. 3 that was entitled to go through there at thirty miles an hour. It had to make thirty miles an hour to make up schedule, forty minutes to Niagara Falls. And here was a Niagara Falls train that the engineer said commonly went by that tower forty miles an hour, if the signals were all right for those fellows. But that is not the way they were going this time. Have you noticed that? Isn't that a rather curious thing? Keck says—you remember that fellow that changed the "K" around—Keck says he stood there six car lengths, or 600 feet.
1038 There was six and four. The Michigan Central train was 6 and Kinney's engine was 4 car lengths away from the point of collision when he saw them, when they were coming together, Kinney going six or seven miles an hour and the Michigan Central going ten. Reithenburg says when Kinney came into sight here (indicating) the Michigan Central was there (indicating). Now, if the Michigan Central had a clear signal here (indicating) and a clear signal here (indicating), it would have gone through there thirty miles an hour. If the Michigan Central had had a danger signal there it would have come up slowly until the signal cleared out, and then it would have picked up speed, and as Freeman sees it, as he looked out his window here (indicating), he saws the Michigan Central was picking up speed at Hertel avenue. Goulding, the forty mile and hour fellow, says that he saw that caboose when he was

within 50 feet of it, when he was just starting to put on the brakes, and he hit the caboose and brought it back 750 feet from the point where Reithenburg marked on the map. He put his initials there (indicating). 750 feet he brought that caboose back, after John Freeman had had time to go down in the elevator and shut down his machinery and walk over to where Kinney was. His esti-
1039 mate was about 5 or 10 minutes. Nobody's estimate of time on such occasion amounts to anything. I don't rely on it. I only point out he had time to go downstairs and go over to the wreck before that Niagara Falls train got there. It would have been plenty of time for Kinney to have come out and be switched onto the other track if the accident hadn't happened. Do you suppose, gentlemen of the jury, that they could hit a light caboose traveling in the opposite direction, going forty miles an hour, and bring it right back on the rails, without derailing it? Such a thing strains the credulity of any intelligent man. You can't believe such a thing. Was Goulding coming up there slowly, gentlemen of the jury, as he would have if the signals had been set against him at the bridge, and cleared up as he approached? If he was coming slowly he could have bumped into the caboose and carried it back just as he did. If he was coming forty miles an hour what would have happened to that caboose? You know truth is a curious thing, truth hides in obscure places, and you will find it when you look. Of course there is another possibility, and that is that that signal, stuck, that it never was purple until after the accident when the wires had been pulled and the coal had fallen on the wires, on account of the part that carries the purple lens being heavier, when the wires were broken or sud-
1040 denly wrenched or pulled on, by reason of the safety mechanism of the thing that would bring it to danger, and I presume that undoubtedly after the accident, and after these men had jumped into the wires, and after the coal had fallen onto the wires, that what Mattern says and what Mr. Kells says is all right. And yet there is a funny thing about that that makes me think. Of course there are two men that have come here and said that after the accident it was purple. Mattern, the conductor, Boyle and Mullen's conductor, and this signal fellow that was not produced for five or six or seven years, Mr. Kells. Here is the thing that happened right here (indicating). Here is Mr. McEwen up in the tower taking these statements. Can you gentlemen understand why they didn't come down and look at this dwarf? Here is an accident that was turning on the position of that dwarf, and here they were taking statements 100 feet away from it, and not one of them went down to look at it. And then here is Engineer Mansfield, and his conductor, Clifford, and this trainman Bronson, that had the fine eyes, from over here (indicating), that came right down the same track that Kinney came on, for the purpose of hanging onto the back of Kinney's engine, and for going right down to that dwarf, and not one of these fellows says a thing about the color of that dwarf after the accident.

The silences in this law suit are as significant as the testi-
1041 mony. There are spots when you would except the railroad company to have evidence, and they are silent. What hap-

pened to Wing? Did you notice Wing here all during this trial until the last day or two, Wing, the man that went out and examined the thing afterwards, an eminent engineer here in Buffalo, and not employed by the New York Central. At least they could claim that he was disinterested. And they sent him out to examine this system to find out how it worked, and he is the fellow that makes the seventeen seconds' test.

Mr. Spratt: If your Honor please, I take exception about Mr. Wing not being sworn. I want to add also that Mr. Wing was not sworn at either of the last two trials.

Mr. Ward: Mr. Wing was sworn on the first three trials.

Mr. Spratt: He was here to advise me, not as a witness, but as a consulting engineer.

Mr. Ward: Now that Mr. Spratt has expressed his view about it, does he explain? If Mr. Wing had knowledge and information about that tower, if he could come here and satisfy you that that that was in good condition after the accident, wouldn't you or I, if we were in Mr. Spratt's place, have him here? Wouldn't we have him step up on the stand when he has been sitting here in court along side of Mr. Spratt for four or five days, and then when
1042 the time comes to offer that kind of proof Wing disappears, and they make their proof by Newman, who was not in Buffalo at the time. And then they swear Kells. Before I get to Kells I want to talk a little about Mullen's signal. Of course they claim this signal is something that is more to be seen than heard. You saw these railroad men and what they did. You saw the signal given in the book up and down, and you heard every railroad man that was sworn say that wasn't the way it was given in practice. Mr. Spratt abuses them for it, but Kinney doesn't decide how they shall do it. It is the railroad company that determines what the practice is and permits it to go on. If they have got a scheme of raising a lantern up and down in the book that will put a lantern out, and the men hadn't used it, but do this (indicating), is Kinney going to say "I won't proceed unless you give me the book signal?" How would he last when every brakeman on the railroad knows that signal (indicating). Well, we have judges here, Peck and Charles Kinne. I had other witnesses—I won't mention them—but there was their track engineer Peck and a man almost equally as good, Charles Kinne, and I asked them when I was giving the stop signal as shown in the book what kind of a signal showed. You heard their testimony. You can't bring a man here from Hornell to break that.

1043 What did Mullen do that night? Did Mullen see a green light all the while, gentlemen, and was he giving a proceed signal, or did there come a time when Mullen detected that it was purple, and did he give a stop signal? Now, there is a good deal to be said on both sides of that question. In the first place, if it was green all the while, through some fault of the tower, or some fault of the signal, there would be nothing that would cause Mullen any anxiety until he got his eyes on those main track signals, and they showed something different, and then he would jump just as he

did. If it was not green all the while, but if at some time it became purple, then what should Mullen do? Because he knows he is the boss. He is there conducting that movement. Now, in the first place, what did he do? Have you noticed that Mullen doesn't claim that he saw the signal green where Kinney saw it? Neither does Boyle. There is no contradiction of Kinney's testimony as to the position of the signal at that point except the operation of the machine. There is nobody that swears that the signal didn't show green when the engine was here (indicating). There is one man that could swear to it, and that is Sauer. Mullen says he first discovered it five or six car lengths from the dwarf. They tried to get him further back on this trial, and he put it a car length down to Hertel avenue, and when I called his attention to his former
1044 testimony he said that was true, and abandoned this car length from Hertel avenue, and put it up here (indicating). That is when he first saw it purple. Of course it might have been changed while the car was passing from here to here (indicating). That would take 30 seconds, time to change it twice if he wanted to change it, if Reithenburg had been engaged in changing it at that time. When Mullen got up here (indicating) he says he saw it was purple. If it was purple Mullen knew it was his business to stop that movement, didn't he? Because for the moment he was in command. He was out there where he could see. What did Mullen do? And remember, if this is under the Federal Act we are entitled to recover for Mullen's carelessness. The master is responsible for Mullen's carelessness if you hold that this is under the Federal Act. What does Mullen say himself he did? I had quite a little trouble getting him to come back to this. You see, gentlemen, when you cross examination a man six times—just think of it, six times—and he discovers how he has put his foot in it before, he is going to fix that up the next time if he can. And you saw the struggle I had with these fellows, and the difficulty I had to get them back to the story they told in the first place before that point of what part of the
1045 signal Kinney could see occurred to them. So that I say truth hides in obscure places. They never thought what they were testifying to on the first trial and how it worked out. But see, here is what Mullen said then, and what he finally was man enough to come back to and admit on this trial, although Brother Spratt got him to say on his direct examination something entirely different, got him to say that he had his shoulder outside and was doing all his signaling out here (indicating). I am confronted with this testimony:

"That is the position I assumed, my back up again- the forward end of the caboose, my feet on the sill.

Q. Your body was over this space that the steps come down?

A. My body was in line with the edge of the caboose."

Tried to get himself outside first, you know.

"My body was in line with the edge of the caboose.

Q. Your body was over this space that the steps come down?

A. Yes, sir.
Q. Did you at any time during the balance of the movement get down upon the steps?
A. No, sir.
Q. Or change your position in any way?
A. No, sir."

There is Mr. Mullen, the man in control of the movement, and the man that says that he knew that Kinney was shoving out contrary to the indication of a signal. What was Mullen's duty if he saw that
happen when he was the man in command? What was his
1046 duty? He says he stayed right there and did nothing, doesn't
he, except to waive his lantern? There he was, provided with a red lamp. There his whole apparatus was proceeding at a rate which would enable him to step down on the ground and find out what was the matter with that engineer. Anybody in the railroad business has heard of fellows that threw their lanterns into cabs, and he says although he was sure of the position of that signal that when he got to it he lowered his lantern and examined the position of the arm—the same thing that Boyle swore to. Isn't that curious? Was that suggested to him by somebody or did they both do exactly the same thing? If they both did exactly the same thing why were they in doubt about that light? His back up against the caboose during that whole movement, his feet down on the steps and waiving his lamp. Now, you see, gentlemen, when he got to that dwarf, then he knew he was wrong, then he knew they were running by and were doing something dangerous and improper, and he was in command. When Mullen got to that dwarf Kinney was 65 feet back of him. Kinney had to go 65 feet at the rate of 9 feet a second. How many seconds is it? You can run a hundred yards, some of them can do it in ten seconds. Nine feet a second Kinney was going. Nine into
65. Lots of time for Mullen, and it was not until Kinney got
1047 by the dwarf 10 or 15 feet that it was possible for his engine to foul the Michigan Central engine. There was an imminent peril that confronted Kinney. Kinney was jeopardizing the lives of all those people on the passenger train. What about Mullen? There wasn't any steam to stop Mullen's view. Mullen didn't have anybody to rely on as Kinney did, and yet he says "I never changed my position in any way." Now, gentlemen, was that light purple or was it green? Were Mullen's actions the actions of a man who believed everything was all right or were his actions the actions of a man who knew that engine was running right out into the path of two passenger trains? Which? Of course this business about swinging the lamp across the platform shows the kind of signal Mullen was giving. What was he swinging his lantern across the platform for if he wanted to stop Kinney? Don't they all say if he wanted to stay up there on that platform with his back against the front of the caboose he should have swung his stop signal out here (indicating)? And yet Mullen admits that he swung a stop signal across the platform? And do you remember Reithenburg said "I couldn't see the man". I had to bring him back to that testimony he gave

569

first before he discovered what trouble they had got themselves into.

Reithenburg says he was swinging the lantern across the
1048 platform, and this man Kells, who was looking down there,
and he was giving testimony to help out his railroad company, he says he was swinging the lantern across the platform. What did Kinney see? Didn't he see just what Engineer Keck and Engineer Charles Kinne testified he would see if he was doing that? If Kinney is in any sense to blame in relying upon Mullen's signals what about Mullen, who gave the signals? And for his negligence this railroad company is responsible if this is under the Federal Act.

Now, gentlemen, I have said about all I want to say upon that phase of this lawsuit, and perhaps I am unduly taxing your patience, but this is a very involved matter which presents so many perplexing problems of railroad manipulation and operation that it seems to me important to discuss them in much more detail than I ordinarily do. There was a big hole in this lawsuit, because nobody had contradicted Kinney that he saw that light green back here (indicating), and there was plenty of time to change it up to the time that Mullen and Boyle say they saw it on the other side of Hertel avenue. That hole had to be plugged. So nine years afterwards this man Kells appears here on the witness stand. Nine years afterwards.

Now, here is a diligent attorney who holds his position as the
1049 principal corporation lawyer of our city, because he is diligent, and he has got a diligent force, and Mr. Powell, who was associated with him, an extremely competent lawyer, and a very skillful one, and Mr. Rourke was one of the most experienced trial lawyers at the Buffalo Bar when he tried those New York Central cases for years, as many of you know. And Mr. Rourke says—I hated to put those men on the stand, gentlemen of the jury. It is not a nice thing to put your professional brothers on the stand. I never did it but once before in a lawsuit in my life. But to think of that man coming up after nine years and saying that he could remember the most important thing in the lawsuit, he had worked for the railroad company all the time, and the very thing we were fighting over, and he never had been sworn. So I thought in justice to my client I ought to find out whether that was something gotten up to plug the hole that had never been plugged before, or whether it was honest. Now, I can't discuss that much further. Spratt, the head of this firm, says that he never heard of such a claim. And he was the head of it then, the active head of it. Hoyt wasn't doing very much in the railroad, I don't think. And Powell and Rourke, who had charge of that lawsuit, they hadn't heard of it, and then

Rourke—think what a reflection this is. Here is the most
1050 important witness, and he worked for them at the time, and they never produced him. Rourke says "I endeavored to find out whether these signals and lamps had the attention of a lampman on that day, and my investigation led me to believe, and convinced me that they had, but as to who the person was that gave them that attention I could not determine or it was never disclosed to me by that man or anyone else. That is all I can say."

Poor Hugh Rourke has had his ups and downs in life, but he was

not going to be subjected to the implied charge of neglect that Mr. Spratt's present attitude involves. And Kells says he went to that office and told this important thing, the thing important above all other things in this case, at three trials. And as I called Rourke's attention, I was commenting in my briefs at the Appellate Court on the fact that they hadn't produced that fellow, giving them notice that I claimed that was a failure in their proof. Then they go to trial without him. And then nine years later he appears, and he says that he lighted fifty lights that day and he can swear now how that spec showed. He was asked whether it was a part of his duty to observe or report on the position of that spec, and he was obliged to admit, after some palaver, that it was not, that it didn't make
any difference to him what position it was in as long as it ap-
1051 peared to be all right. He might find it green and he might find it purple. And remember this observation is made in the day time. Here are these two little lenses, right opposite the other, one purple and one green, walk out of here this afternoon and ask Mr. Poore on the stairs how many lights were lighted in this court room, and where, and he can't tell you, or ask me. Did you go in the front door or the back door today? How did you go in the barn? These things that are routine with us. Did you put on your right sock or your left sock first this morning? These things that are routine with us, who remembers them? And yet there is a man after nine years is willing to take his oath as to that thing that he had no particular concern with. And then he tells McGrath, then he tells about that note, and then I subpœnaed the note. It wasn't burned up down at Depew, but they haven't got it. I asked him about the memorandum. "Well, he destroyed it." When I showed him his testimony two years ago when he first appeared with this tale of his, and then he swore that he made no note. Now, put that on the top of Boyle. They have got to beat Kinney, and may be they can, but they will have to have a lot of help from you. Of course there was a man, you know, that was the regular repairman
at that tower, not the fellow that lighted the lamps, but the
1052 regular man that fixed things up. He isn't here. Reithenburg says he left there at 3:30 and this man got there at 4. Reithenburg says he doesn't know what the lamp showed. All he knows is what the lever showed. Where is that other fellow? That fellow isn't here.

That machine—what a perfect acting device it seems when Reithenburg gets up and pulls the lever. I remember when that was first produced in the court room I was a supervisor, and we had just bought the voting machines, and we had some dandies, couldn't have any mistakes, they were perfect, and the first election I think it was between Charles Smith and Colonel Alexander, and you will remember what the voting machines did in that campaign. I don't know any machine that can be depended on always, and while this presents a very formidable appearance in the court room you have got to remember that a part of that machine in its effectiveness are the lines that run out along the side of the track, around the curves, under the ties, wires, wheels, chains, a complicated mechanism all

exposed and open at a place like that where hundreds of workmen are passing daily, where hundreds of coal trains are coming along and coal falling off. Does anybody doubt the testimony? They are discharged, but who says it is not true. Does anybody doubt
1053 the testimony of Johnson and Goodfellow that they hired men whose business it was all the time to go around and keep putting those things in repair?

So, gentlemen, I have discussed, I think all I should the liability of the defendant under the state act. If they gave Kinney a wrong signal there and took it away from him, or if that thing stuck and he was fooled by it, then they are liable to him.

Now, if you find that this is Interstate Commerce, exactly the same considerations apply except this: That if it is Interstate commerce, and the United States Act applies, and you think Kinney did something that he should not have done, or omitted something that he should do, and if that accident was also contributed to by the carelessness of Boyle or Mullen or Reithenburg, or the machine, or the spec, Mr. Kinney still has the right to recover, and you deduct from his recovery such sum as you think his negligence bears to the total negligence. I never could feel though, and perhaps I have got partisan, a man can't sit up and fight for a man ten years without getting it under his skin pretty deep, and I suppose I have got a little partisan in this matter—I never could see where Kinney, with that rule that they could not change those switches after they had once given him the light, I couldn't see where Kinney contributed any to this accident, because he knew that even if they did
1054 change the light if they complied with their own rules they couldn't let those other trains run down there. See where those other train- were, if they had been coming at full speed, while Kinney was coming from Hertel avenue to there (indicating). When you get to the jury room it may interest you to figure that up. I remember I made some notes. I feel that I owe you all an apology.

The Court: You are entitled to more time if you want to take it. We gave up the morning to Mr. Spratt, and we will give the afternoon to you.

(Short recess.)

Mr. Ward: Before I leave this phase of the case I wanted to call your attention to one thing. Mr. Spratt lays a great deal of stress on the fact that the trainmen of the passenger trains said they saw clear signals, and of course he argues from this that Kinney must have had a danger signal, assuming that they worked all right. There is a little flaw in his argument though. You have got to realize the different rates of speed at which those trains were approaching, and also the fact that the Niagara Falls train got there so long afterwards. Now, even if the argument that I make to you, that the circumstances showed that these trains were approaching slowly, especially as illustrated by the fact of the collision
1055 of the two engines, even if you doubt that argument, even if you assume that those trains were approaching at their nor-

mal rates of speed, 40 and 30 miles respectively, supposing Reithenburg had changed that dwarf between the point where Kinney saw it green and the point where Mullen and Boyle saw it purple, or at Hertel avenue, we will say, supposing the change was made at Hertel avenue, 475 and 60 feet, 500 feet, we will say, Kinney had to go at six miles an hour. Now, if that Michigan Central train was running at its normal rate of speed, thirty miles an hour, it would have been a quarter of a mile the other side of Tower "H" Tower "H" is only 1,500 feet. It would be going five times as fast as Kinney would, while Kinney was running 500 feet.

Juror No. 2: What is that point? I didn't just get that?

Mr. Ward: Why, Judge, while Kinney was running from Hertel avenue at six miles an hour, 500 feet, and the Michigan Central was running its normal rate of 30 miles an hour, it would be five times as far. Five times 500 is 2,500 feet. It is less than 1,500 feet to Tower "H." It would have been a thousand feet beyond that when that change was made. The same thing with the Niagara Falls train only more so, because the Niagara Falls train didn't get up there for a few moments at least after the collision. So you see that
1056 all their crews on the main line tracks don't amount to anything. If that thing was changed when Kinney was at Hertel avenue the Michigan Central train would have been a thousand feet from that distance signal if it was going 30 miles an hour. If it was only going 20 miles an hour it would have been two or three hundred feet beyond the distance signal. Now, one other thing in this lawsuit, which has been a matter of my personal judgment, and that was the question of swearing Sauer. Mr. Spratt had talked about it quite a little. You see Kinney told you that Sauer called those signals to him, and that was Sauer's duty under the rule. It was his business to call those signals. It was the business of Sauer to look for Hertel avenue one way while Kinney looked the other way, and it was the business of Sauer to announce to Kinney that dwarf. They announced it to each other. That was Sauer's business. Boyle says he didn't do it. Kinney said he did. Now this is the situation as we view it about Sauer. Of course I have seen what seemed to me the influence of the service on some of these men. That was in Mullen's testimony, and it was in Boyle's testimony. Now, it seemed to me that as long as Sauer was in their service, was an employee of the New York Central Railroad, and as long as it was his duty to observe that signal, that the New York Central
1057 Railroad was not in a position to ask a jury to disbelieve Kinney, when they had in the person of their own employee, a man who knew just as much about it as Kinney did, and a man whom Kinney said called the signal green to him. Now, if I should put Mr. Sauer on the stand and Mr. Sauer should do what I believe Boyle has done, and say "I didn't call that signal green to Kinney," then I couldn't prove to contradict Sauer what he had said. You can't impeach your own witness. If they put Sauer on the witness stand, and he said that he didn't call that signal green to Kinney, then if I had any evidence that he said, or stated to the contrary, I could bring it before him, and so long as Sauer was in their employ

the law says, and I believe his Honor will charge you, that where a man fails to swear a witness who is under his control, you have a right to presume that that witness' testimony would not be favorable to his employer. That is a rule of common sense and it is a rule of law. Now, I didn't know until Brother Spratt explained how nearly they came to fooling me on the last trial. It seems that for some reason Sauer left the service of the New York Central and went to work for the Lehigh. So that I couldn't say he was in their employ. But then he comes back to the New York Central after the trial is over, and here he is working for the New York Central
1058 now, and so my bump of caution in suspecting that that was a maneuver on the part of Brother Spratt apparently is justified by the fact that Sauer walks back into this court room, and I require him to produce him, and it turns out he is back again working for the New York Central. Now it is up to you to say, gentlemen, who should have sworn Brother Sauer, and it is up to you to say what the effect of a man in their employ, who stood beside Kinney, and whose duty called on him to notify Kinney as to the position of that signal—it is for you to say why they didn't produce him here as a witness before you when he is working for them, and he is alive, and of course I asked them to bring him here in the court room so that you would know he was alive, and a man that had that information. That is a little more of this Boyle stuff, fires and lost records.

Well, gentlemen, I have said about all I want to say to you in this lawsuit. I have rather appreciated the opportunity to try a case before you because I think you are reasonable jurors. I think you will all arrive at a fair solution of this issue, and that is all the plaintiff has any right to ask. When he gets a fair chance to submit his case to an impartial jury that is all he has a right to ask, and he asks that here. Now if he is entitled to a verdict, gentlemen of the
1059 jury, what is he entitled to? In the prime of life, forty years old. In the order of seniority you saw how these fellows worked up. I suppose there are these men of the same grade of employment as he was, fellows like Keck and Charlie Kinne, and Goulding—Goulding has got to be a passenger engineer now, and Kinney had just as much right to expect those higher positions as they. Six or seven dollars a day, an opportunity to live comfortably, give his family and his children the advantages of life, look the world in the face and walk around on two legs like a man. That is what ordinarily would have come to him. Nobody seems to say that there was ever anything wrong with Kinney. He had worked for this same company for twenty years. Well, now, he has got an expectancy of twenty years. He has lived ten, and he has lived in hell. No man could single-handed support the burden of such a contest as he has against such a powerful adversary without it putting dents in him mentally and physically. There was never such a case in the annals of this country. Ten years. No earnings. What is that? Figure it out, just his lost time to now. Over $20,000. At 50, a right to look forward to having ten years at least more of active life in the railroad business, which would mean another $20,000.

At 50, one leg gone and the other useless, both knees creak-
1060 ing as he walks, with crepitation, with back bowed over, with the muscles of his spine and hips contorted, a miserable unhappy existence, trying to farm, the last resort, and anybody who has worked a farm knows how necessary a sound body is for that. You gentlemen who have farmed, and have made a success of farming, do you suppose you could have bought and paid for a farm if you had been crippled up like that fellow? And so it comes to you here, and he says to you "If I am entitled to damages I want you to consider my whole situation. I want you to consider the ten years that have elapsed since this accident, and I want you to consider the twenty that, under ordinary circumstances, I have yet to live." Do you suppose there has been a day free from pain? Do you suppose down on that place in Niagara County on the banks of Ellicott Creek, where he tries to eke out a scanty livelihood, do you suppose he takes hold of a tool or a horse or a cow without being conscious of his defects? A man that weighed 180 pounds and stood nearly six feet in his stockings, and look at the height of him. He isn't entitled to one cent for sympathy, but he is entitled to a full measure of damages. He is entitled to his pay just as much as if I went down to Mr. Jacobs' lumber yard and bought lumber at a fixed price, and I didn't pay for it, and he sued me, and you sat on the jury, you would
1061 make me pay for it, and pay interest. You wouldn't say "Well, give him half." That wouldn't be justice. If Kinney is right, if Kinney has been entitled to a verdict for ten years, they have had his money, because your verdict in a death case draws interest, you know, but in a case where a man survives it doesn't. We ask that you give him his money now, at the present value of money, which is worth just about fifty cents on the dollar of the money that he was drawing ten years ago, as you know, and if he is entitled to that money the New York Central has had his money all these years, while his girls have been grow- up and his needs have been increasing. It is the dollar today, the depreciated dollar of today, that you have got to measure his damages by. Don't forget that. He never will have any earning capacity. Nobody claims that. When you come to measure the loss of his time it is easy. When you come to measure the pain and suffering that he has endured for ten years it is hard. I can't aid you in that. You will have to use your own best judgment about it. I could see how it would be a hardship to a man to say to him "Well, you must quit your railroad place and you must never have another place." But if he kept his health and his strength the woods and the fields would be his. But when you say to a man "You can't earn any
1062 more money and you can't enjoy the blessings and comforts of physical freedom," that goes further. That goes further than anybody has ever gone with you or with me, because I think that the loss of money would mean much less to us than the loss of our ability to enjoy our physical freedom. And as we grow older, and the ills of life begin to set upon us, we appreciate more and more what that means. And at forty he stopped. And some of us have enjoyed many happy years since we were forty. And so, gentlemen, without any request of you, except that you do this man

justice, I transfer this burden which I have tried to carry for him, to your shoulders, because that is what your oath requires you to undertake. That is what citizenship in this land of ours involves. You owe a duty now, and when you determine, if you do, that John W. Kinney is entitled to a verdict at your hands, don't say to yourselves "Well, if we give him a small verdict it may end this lawsuit." Don't work that way. Give him what he is entitled to and every cent of it. My friend Spratt won't stop fighting here. He is entitled to protect all his legal rights to the uttermost, and I have no doubt he will do so. And I only have a right to ask of you gentlemen the full award that this man's damages proved entitle him to.

This litigation has been a heavy burden to him and to me,
1063 but that has nothing to do with it, and now we hope we are seeing the daylight, and we are coming to the end. We look at you gentlemen with confidence, and we know that as men of experience and years you can look through some of the fogs and mists with which this case has sought to be enveloped, and that the truth, though sometimes hidden, will be understood by you.

The Court: Now, gentlemen of the jury, I feel it would not be treating you with proper consideration if I charged you tonight at this hour, because you will require some time to deliberate upon the issues that have been presented to you as the issues of law in this case. I will therefore take an adjournment until tomorrow morning at 10 o'clock when, at the opening of the court, I will charge you and place the case in your hands for final determination, and you will recall that at all of the former adjournments in the evening I have admonished you that during the interval of the adjournment you are not to talk among yourselves about the case, nor certainly talk about it with anybody on the outside, or form or express any opinion upon it until the case is finally completed with the charge of the court, and then take it up and discuss the evidence and the law.

(Adjournment until Friday, February 7, 1919, at 10 o'clock a. m.)

1064 Friday, February 7th, 1919.

Mr. Spratt: If the court please, I take exception to the statement made by Mr. Ward in his summing up, his statement being "So that it became necessary for Mr. Kinney to amend his pleadings and allege that he and the railroad company at this time were engaged in Interstate Commerce. Whether he could make that proof or not he didn't know. And so that question was finally settled. His right was disputed by my friend, and finally the highest court to which the question could go decided that Kinney had a right to recover if he could prove interstate commerce under the Federal Act, and we come down to have you decide two questions."

Now, I claim that such is not the case. The highest court never made any such decision, and I will ask your Honor in charging the jury to cover that.

The Court: I will dispose of it right now. I will tell the jury that

the Appellate Division is the highest court that that question reached. It has not yet been passed upon by the Court of Appeals, but it is the law of the State of New York, which you and I must consider, having been made the law through a decision of this court which was affirmed by the Appellate Division.

Mr. Spratt: But the highest court didn't decide—even the Appellate Division didn't decide that Kinney had the right to re-
1065 cover if he could prove interstate commerce under the Federal Act, because there were so many other things—his negligence.

The Court: Oh, yes, among all the other things concerning which I will charge you, but if he can prove that he was engaged in interstate commerce he can recover.

Mr. Spratt: That I take exception to. He can't recover if it was his sole negligence.

The Court: Oh, no, not if it was his sole negligence. I am going to cover that very fully in my charge later, as the jury will hear when I give the charge, but this is not the time to make requests to charge. Later on you can make more requests, and you have already laid before me a large number which I have carefully considered, and shall dispose of and pass upon at the time.

Mr. Spratt: The reason why I raised the question is that I didn't want it to pass unchallenged, and I wanted to call it to your Honor's attention so that in charging it could be covered.

The Court: It will be covered by the charge, and if not you will call my attention to it again at the close that it may be drawn to the jury's attention.

1066 *Charge of the Court.*

GENTLEMEN OF THE JURY: At the outset I wish to impress upon you the fact that you, as trial jurors, form an important branch of the court in the administration of justice. You are the sole judges of all of the facts in this case and of the credibility of all of the witnesses who have given their testimony. It is your duty to find and determine from the evidence produced on the trial all of the facts and circumstances attending and surrounding the occurrence of the accident which the plaintiff claims occurred at this time, and also to carefully observe and follow the instructions of the court as to the rules of law that are applicable to the facts as you shall find them.

This action is now before the court for its sixth trial, and presents for the consideration of the court and jury questions of alleged negligence which seemingly will be made complex by the necessity of considering and applying to them and to the disposition of the issues rules of law both under the State Employers' Liability Act and under the Federal Employers' Liability Act.

The plaintiff, John W. Kinney, has brought this action against the defendant, the New York Central & Hudson River Railroad Company, to recover damages for personal injuries sustained by him in an accident, which he claims was caused solely by the negligence

of the defendant. By his amended complaint he alleges that
1067 at the time of the occurrence of the accident the plaintiff and the defendant were engaged in interstate commerce, and therefore subject to the provisions of the Act of Congress known as the Federal Employers' Liability Act, which took effect in April, 1908.

The plaintiff contends and has given evidence by which he claims to show that heretofore and on the 12th day of October, 1908, and for some time prior thereto, he had been in the employ of the defendant as a locomotive engineer, and engaged in operating a locomotive of the defendant over its tracks in this state, and that on that day, which is now more than ten years ago, he was directed to report for duty at the defendant's roundhouse in East Buffalo, between 12 and 1 o'clock, and was given engine No. 2499 to run; that during the afternoon he was engaged in hauling freight by operating his engine and trains to Tonawanda and Black Rock, that at Black Rock the defendant has a freight yard with tracks and sidings for the purpose of storage of cars, and that on the evening of the day after he had reached Black Rock he was directed to take a string of cars which was standing upon a siding called the fence track, and coupled his engine and caboose upon those cars for the purpose of taking them to East Buffalo. He has testified that he was directed by some one there in authority in hauling these cars to East Buffalo to attach his engine ahead of the train, and that in order to make such a connection it became necessary for
1068 for him to move his train over and along certain tracks known as the Y in the yard; that he left the main track with his engine, ran upon one branch of the Y, and then reversed, and in taking the other branch of the Y, which would have connected him with the main tracks of the defendant's road it was his intention after getting onto these tracks to back his engine down again over the main tracks, and in that way to couple his engine upon the string of cars which was standing upon the so-called fence track, so that his engine would be at the head of the train, and he could proceed to draw the cars to the point to which they were consigned. And he testifies that while he was engaged in that general operation the accident occurred, that after he had reached what is known as tower I he received instructions to take the left hand one of the two tracks on the Y which ran up to the main tracks as shown upon the map which is here in evidence, and that in doing that he had to run against what is known as the current of traffic; that the movement of his engine or train was governed by signals provided by the defendant, and that among those signals is what is known as dwarf signal No. 6, which was nearly opposite what is known as tower No. 55.

The plaintiff further claims that according to the rules and reference to signals which were adopted and in force by the railroad company, and well understood by all its employes, if the light shown by this dwarf signal was green then that was a sign to the
1069 engineer that he had a right to proceed past the signal, but if on the other hand the light shown by the dwarf signal

was purple, then it was a signal to him that he had no right to pass beyond it until further instructions were given to him by signal or otherwise. The plaintiff claims that the engine that he was operating was a defective engine in that owing to its being out of order it permitted an unusual amount of steam to escape from the belly of the boiler and from the piston and other connections forming a part of the mechanism of the locomotive.

The plaintiff testifies and claims that as he came along the Y, and was approaching tower No. 55, the signal of dwarf 6 showed a green light, which if it did was an indication that the way was clear, and that he had a right to proceed on past the signal and out upon the main tracks unless he should receive other signals after so passing dwarf No. 6 to stop his engine before reaching the main tracks of the defendant. His contention is that as he passed over Hertel avenue, which is in the neighborhood of 500 feet from dwarf No. 6, he looked and observed the light on this dwarf No. 6 and that it showed green, and that assuming that he had a right to proceed he proceeded, and it seems to be undisputed that under the rules of the company, notwithstanding its light was green as he approached it, still it was his duty to continue to make observations as to the color of this signal, and if before reaching or pass-
1070 ing dwarf signal No. 6 the signal should have been changed to purple, which would forbid further movements in that direction, it was his duty to stop and proceed no further. But the plaintiff claims and testifies that he made observations as to the color of this light on dwarf No. 6, and that about that time as he got near to it owing to the escaping of steam from his engine, which the wind carried over across his engine, and which enveloped more or less his cab, he maintains that this signal showed green and that he had a right to proceed. The claim is further made that if it was changed he was unable to notice the change owing to the presence of the steam at that point. He did proceed and he continued to run his engine out onto the main tracks of the New York Central road. At that time while he was proceeding along this Y he had attached to his locomotive a caboose which was ahead of the locomotive, and on the front end of that caboose was located a brakeman, Mr. Mullen, who it seems was there for the purpose of observation, and to give notices to the engineer. It appears that before the plaintiff's engine had actually reached the main track, and while the caboose was on the tracks probably across the main tracks a Michigan Central train, a passenger train, came along, and that train came into collision with the caboose and the plaintiff's locomotive, and as the result of this collision the plaintiff's engine was thrown over upon its side, and he was thrown out of the cab and caught under the tender of his engine, while the caboose
1071 itself by the impact of the train was cut loose and pushed forward and proceeded some distance upon the main track northerly, and then another passenger train coming on a parallel track in the opposite direction came in contact with the caboose, carried it back, and it was finally thrown upon the derailed engines.

The plaintiff claims that the defendant was guilty of negligence

in failing to communicate to him the proper signals to stop him, and by failing to provide him with a proper and suitable engine, and that all things combined together misled the plaintiff as to the course to be pursued by him in the operation of his engine.

The defendant on the other hand contends and has given evidence by which it claims to show that the accident was caused solely by the negligence of the plaintiff himself in not observing and regarding signals which were given to him to guide his movements on that night. The defendant contends that there was established at this point an interlocking system of signals; that the light on this dwarf No. 6 instead of being green was in fact at all times shown at purple, which was a warning to the plaintiff not to proceed past that point, and that by means of this system of interlocking signals the mechanism was so contrived and arranged that when the way was clear for the passing of trains upon the main track the signal light on dwarf 6 necessarily was to be shown at purple; where it showed green for the passage of trains on the main track it neces-
1072 sarily showed purple on the switch track or on the Y track; and that unless this system of signals was out of repair it was an impossibility to show a green light on the main track without at the same time showing a purple light on the Y track. And it is further contended by the defendant that on the night in question there was nothing the matter with the interlocking system of signals, that it was in perfect working order.

The engineers who were called by the defendant, and who were operating the passenger trains, the one that collided with the plaintiff's locomotive and the one running in the opposite direction, both testified that the signals on the main track were green, claiming that it thus gave them the right of way. A part of the mechanism of the interlocking apparatus has been brought into court, and the system has been explained to you fully. The witnesses have testified that they observed the dwarf signal at the time that the plaintiff's engine was running upon track Y, and that instead of showing green, as he claims, it in fact showed purple.

This presents for your consideration and determination the principal questions of fact upon which the negligence of the parties is claimed. There is presented to you a conflict in the testimony between that of the plaintiff and that of the witnesses for the defendant as to what the light at the time the plaintiff reached or
1073 was about to reach the dwarf light actually showed, whether purple or green. And where conflict in the testimony of witnesses in the trial of an action is presented it becomes the province of the jury to determine which version claimed by the respective parties is the true one and what are the facts.

One of the questions of fact for you to determine from the evidence at the very outset of the case is whether at the time the plaintiff approached dwarf No. 6 and passed it, the light upon it was green or purple, or whether it gave him the information or indication of permission to proceed, and whether he should have stopped if it was purple and observe the signal which that color indicated.

In addition to this the defendant further claims and contends

that in addition to the signals furnished by the lights there were other signals given which the plaintiff ought to have observed. It has been testified that there was riding upon or claimed to be riding upon the locomotive which the plaintiff was operating one of his brakemen, Mr. Boyle, and his fireman, Mr. Sauer, and that under the rules of the company it became the duty of these men as an additional precaution to observe the signal lights, and to call out those signal lights to the plaintiff, the engineer, for his guidance. Not only was it the duty of the engineer, but it was also the duty of those upon the engine to observe the signals, and the defend-
1074 ant contends that the brakeman Boyle observed the dwarf signal, and saw that it was purple, and that he communicated that signal by word to the plaintiff, and in addition to the men upon the locomotive there was stationed upon the front of the caboose one Mullen, who is referred to as the head-end brakeman, and it was the duty of Mr. Mullen to observe the signals and the lights, and to communicate those signals to the engineer. Mr. Mullen has testified that as they approached the dwarf signal No. 6 he observed the light there, that it was purple, and that after getting to that point he gave to the plaintiff by a motion of his lantern from the front end of the caboose the signal to stop, but that the plaintiff not stopping he gave it more violently and with greater rapidity, but that notwithstanding that the plaintiff continued to proceed, and that an effort was made to stop on the part of the plaintiff only after he had gotten quite close to the main tracks, when he testifies he made an effort to reverse his engine, but that the point of collision was at such a place that he could not avoid the accident. And so the defendant contends that the plaintiff was guilty of negligence which solely caused the accident, by his failure to observe and respect the signals given to him.

And a general rule has been introduced in evidence to the effect that when an engineer is in doubt as to what signals mean, if the signal does not show clear to him, it is his duty to be upon
1075 the safe side and to take no risks, and to stop his engine.

The plaintiff on the other hand has testified that signals given to him by Mullen, and which he saw, were signals to proceed, and that he was not in doubt as to their meaning.

Gentlemen, I have now set forth in a general way the claims of the respective parties as to the facts in this case. It is for you to recall and follow your own recollection of the testimony, and to find and determine all of the facts from your own recollection. Where there are disputed questions of fact of course it is for you to determine the facts and render your verdict in accordance with the instructions of the court as to the law.

To entitle the plaintiff to recover in this action the law places upon him the burden of establishing to your satisfaction by a fair preponderance of evidence as the first and underlying proposition (whether the action is to be governed by the rules of the Federal law or by the rules of the state law) that the accident which resulted in his injuries was due to negligence on the part of the defendant. The plaintiff contends that the defendant was negligent, as I have

already said, by failing to communicate to him the proper signals for his guidance and to stop him, and also by a failure to provide him with a proper and suitable engine in the operation of his engine at this time and place, and that the accident was occasioned in that way.

1076 It is for you to find and determine all of the facts and circumstances surrounding the occurrence of the accident. The plaintiff, as I have stated, is entitled to recover only if you shall find that he has established to your satisfaction by a fair preponderance of evidence as one of the essential propositions that the defendant was negligent. And I will explain to you further the proof that must be made on other propositions to entitle him to recover. By a fair preponderance of evidence the law means the weight of evidence, such evidence as convinces your minds of its truth. It does not necessarily depend upon the number of witnesses who have been called to testify to any particular fact or to any particular state of facts. It depends upon the evidence which you determine to be the truth, and you should take into consideration the opportunities which the various witnesses who have been sworn had of seeing and knowing the things concerning which they have given their testimony, their conduct and demeanor while upon the witness stand giving their testimony, their interest or lack of interest, if any, as disclosed by the evidence, in the result of the suit, and the probability or improbability of the truth of their statements, measured by all of the other facts and circumstances which you deem and find prove in the case; and if after a careful scrutiny of the testimony of the witnesses you should determine that anyone of them has knowingly and wilfully testified falsely regarding any material thing in the case, then you will have the right

1077 to totally disregard the testimony of any such witness except in so far as you shall find that it has been corroborated by other credible evidence given in the case.

A map, several photographs, a sketch of the interlocking signal machine with photographs showing parts of it, and the rules governing the operation of engines, have been introduced in evidence as exhibits in the case, and you have the right to take them with you into the jury room for further examination, and to consider them carefully in connection with the testimony of all of the witnesses, and then to find and determine all of the facts and circumstances surrounding the occurrence of the accident.

Gentlemen, I will explain to you the rules of law that apply to this action under both the State and the Federal acts. But if you shall find from the evidence that the parties were engaged in interstate commerce at the time the accident occurred, so that the Act of Congress known as the Federal Employers' Liability Act applies to the case, then it will be unnecessary for you to consider the rules of law which I shall state to you that would be applicable to the action if it were under the State Employers' Liability Act. For it is the law that the Federal law—the law of the United States—supersedes the statutes of the several states so far as they cover the same field, and is exclusive. If the Federal Employers' Liability Act

applies, no state statute can be considered, for the Federal law is exclusive. Therefore, gentlemen, I will submit to you as
1078 the first question for your consideration and determination the question of whether or not the plaintiff and the defendant at the time of the accident were engaged in an act of interstate commerce. It is known that the defendant, the New York Central & Hudson River Railroad Company, is at times engaged in certain transactions in interstate commerce—that is, in traffic carried on between the State of New York and other states and the Dominion of Canada; and we also know that it is also at times engaged in certain of its transactions in what is called intrastate commerce, that is, in traffic which is carried on entirely within the limits of the State of New York, and in so far as it is engaged in the transportation of freight from New York State into another state, or into a foreign country, as into Canada, to that extent I charge you it is engaged in interstate commerce. Therefore you will first consider and find from the evidence whether or not the defendant on the night in question and the plaintiff, Mr. Kinney, in doing his work as an engineer, were engaged in an act of interstate commerce. You will recall that it has been testified that the plaintiff's orders were to take a string of cars which were standing upon the so-called fence track and proceed with them to East Buffalo; that the way bills and train sheets had been destroyed after they had been kept by the company for several years, for such a period of time that the rules of the Interstate Commerce Commission did not require them to be kept longer, and the plaintiff has introduced evidence by which
1079 he claims to show that the fence track so-called was principally used for the receipt and storage of cars which were received from the Michigan Central Railroad Company through Canada, passing over the International Bridge at Black Rock, and that after their receipt they were delivered to the New York Central Railroad Company by running them along the Y tracks or the siding parallel to the Y, and the evidence tends to show that a very large percentage of the cars that were placed on this fence track and the Y track where cars were received were received from Canada for the New York Central Railroad Company. And certain of the witnesses have testified that they had never observed standing on this track any but such cars. Others have testified that this track is used for both interstate and intrastate traffic. Therefore while the burden of proof is upon the plaintiff to satisfy you by a fair preponderance of the evidence that he and the defendant were in fact engaged in interstate commerce at the time of the accident, I will leave it for you to determine, gentlemen, as a question of fact from the evidence whether at the time of the accident the plaintiff and defendant were engaged in an act of interstate commerce. The question is, has the plaintiff established to your satisfaction that at this time the cars standing on the fence track so-called, which were ordered to be moved by the plaintiff and his engine, were composed in whole or in part of cars received from the Michigan Central Railroad over the International Bridge to be transported to some other point either
1080 within or without the State of New York, because although these cars were not in fact moved that night owing to the

occurrence of the accident before the plaintiff hitched his engine onto the train, nevertheless he having received an order to move them, and the accident having happened while he was moving his engine around the Y in order to attach it to the cars, if you shall find that these cars were in fact interstate cars, then it would follow that the plaintiff was at the time of the accident while making these movements with his engine engaged in interstate commerce.

Gentlemen, at the time you render a general verdict in this case I will ask you to make certain special findings, and a special finding on this proposition, and you will be asked to answer the question whether or not at the time of the happening of the accident the plaintiff was engaged in interstate commerce. If you shall find that he was engaged in such commerce, then, as I have said to you, you will be governed exclusively by the rules of the Federal Employers' Liability Act, which in certain respects differs from the rules of law applicable under the State Employers' Liability Act.

I will first instruct you as to the rules of law applicable to the disposition of the issues involved in this case if they are to be disposed of under the Federal Employers' Liability Act. The foundation of the action is negligence, if liability is claimed under
1081 either the Federal or the state law, and the defendant's negligence must be established by the plaintiff under either law by a fair preponderance of evidence. The Federal Act provides that every common carrier by railroad while engaging in commerce between any of the several states, and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce for such injury resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment and that in all actions brought against such common carrier by railroad under or by virtue of the provisions of this act to recover damages for personal injury to an employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

I instruct you, gentlemen, that contributory negligence is the negligent act of the plaintiff which concurring and co-operating with the negligent act of the defendant is the proximate cause of the accident resulting in plaintiff's injury, and that if you shall find that the defendant was negligent, contributory negligence on the part
of the plaintiff himself shall not defeat a recovery altogether,
1082 but that any damages which you shall find were sustained by the plaintiff must be diminished by you in proportion to the amount of negligence attributable to the employee as compared with the combined negligence of himself and the defendant. The burden of proving contributory negligence on the part of the plaintiff rests upon the defendant.

The defendant for one of its defenses to the cause of action in the complaint has alleged that the plaintiff's employment was at the

time he entered the employment of the defendant, and continued to be, an obviously dangerous one, the risks incident to which were, and continued to be, obvious and well known, and were obvious and well known to the plaintiff, and assumed by him during the entire time of his continuance in said employment, and that plaintiff's injuries complained of arose from and were risks incident to said employment, and which risks plaintiff took and assumed at the time he entered and during his continuance in the employment. It is a rule of law that when a person is engaged in the service of another, he undertakes as between himself and his employer to run all the necessary and ordinary risks incident to such service, and takes his chances as to all open and obvious risks known to him and incident to his employment, and can not recover if the accident was the result of one of such risks.

The burden of proving assumption of risk by the plaintiff also rests on the defendant, and it is a question of fact for you to
1083 determine whether the plaintiff assumed the risk inherent in his employment, and also of the negligence of the defendant been known by the plaintiff, or if it were so obvious that it must be or of a fellow servant, if such risk is shown by the defendant to have presumed that a person of ordinary prudence would have known it.

The plaintiff can not be charged with the assumption of the risk arising from the defective engine, and from the steam escaping for that reason, unless the defect and the danger arising therefrom were both known to him or were so obvious that it must be determined that they would be observed and known by a person of ordinary prudence; and even if the plaintiff knew of the defects in the engine when he started, or discovered them while en route on his trip, he can not be charged with assumption of risks unless he knew and appreciated the particular danger arising therefrom in the obstruction of his vision, and preventing him from seeing the dwarf signal at the critical moment of the accident, or as he approached the dwarf, or unless such danger was so obvious that a person of ordinary prudence must be presumed to have known and appreciated it.

And, gentlemen of the jury, it is for you to consider in that behalf any evidence of the escaping steam previous to the time the plaintiff was approaching the dwarf, and whether it obscured his vision or prevented him from seeing the signals. And, gen-
1084 tlemen, I charge you that if this action is to be disposed of under the state law, because you may find that the plaintiff was not engaged in interstate commerce, the burden of proof will rest upon the plaintiff to establish not only the negligence of the defendant, as is required under the Federal Act, but he must also show that he was himself entirely free from any negligence which in any way contributed to the accident. The burden of proof in the event that this action comes within the state law, and not within the Federal law, rests upon the plaintiff to prove both of these propositions by a fair preponderance of evidence.

Assuming, however, that under the instructions I have given you you shall find as matter of fact that the plaintiff was engaged at the time of the accident in interstate commerce, then under the provisions of the Federal law in order to recover he must establish by a

fair preponderance of evidence, first, that the defendant railroad company was guilty of negligence, and that of course would depend on how you may determine certain facts in this case. In the first place, it should be said that in case you should find as matter of fact that at the time or about the time the plaintiff crossed Hertel avenue, approaching the dwarf signal known as dwarf No. 6, that signal was set at purple, showing a purple light, which was the signal of danger and was a warning not to proceed beyond it, then there can be no recovery in this action. Unless it should appear
1085 that those signals were afterwards changed, and some different signal given, there can be no recovery in this action, for at that time the plaintiff claims that he saw the light itself, and as far as I can ascertain he does not claim that his view was in any way interfered with by escaping steam, and in that event the company had done all it was in duty bound to do to give him a proper warning not to proceed on the main tracks of its line. If, on the other hand, the dwarf signal showed a green light, which was a signal that the right of way was clear and he had a right to go ahead, and this signal was not changed until he had passed the dwarf, and, relying on such signal, without further notice to stop, he proceeded to the main tracks, then the company was guilty of negligence in giving him the wrong signal which caused the accident, and the plaintiff will have the right to recover. If, however, you shall find that in fact the dwarf signal showed green when the plaintiff crossed Hertel avenue, but before reaching it it was changed to purple, and the plaintiff was advised and warned of the change before passing the dwarf, either by seeing the change or being advised of the change by the lantern signal from Mullen, the brakeman on the head end of the caboose, or by the warning communicated to him by Boyle, the brakeman on the engine, if you shall find that such warning was given, or by the fireman on the engine, and the plaintiff had time to stop the engine so as to avoid a collision, then there can be no recovery, because under such circumstances the collision would have been the result solely of the
1086 plaintiff's own negligence and heedlessness in neglecting to observe the signals communicated.

If, on the other hand, you shall find that the dwarf signal was set at green when the plaintiff crossed Hertel avenue or near there, but was afterwards changed to purple, and that fact was not made known to the plaintiff, and all those signals by Mullen and others were in fact given to the plaintiff, but that owing to the presence of escaping steam from the engine he was unable to discern or know what the signals so given by them were, it remains for you then to say under the circumstances of the case whether the defendant was guilty of negligence, and also whether the plaintiff was guilty of any contributory negligence. And I say to you that, as I said before, under the Federal statute it is the rule of law that the negligence of a fellow employee is to be deemed the negligence of the principal; and if those employed with the plaintiff in the operation of the train, or in the operation of the signal tower and lights, were guilty of negligence which contributed to the accident, their negli-

gence is to be in law attributed to the railroad company itself, and will justify a recovery. And I must repeat what I said before, that it is a further rule of law laid down by the Federal statute, that if the accident was not solely due to the negligence of the plaintiff, but was brought about by the joint negligence of both the plaintiff and his co-employees, then the plaintiff still has the right to recover, but the damages to be recovered in such case are to
1087 be apportioned, and the plaintiff's recovery will not be for the entire damages sustained, but for such a proportion thereof as his own negligence bears to the combined negligence of the defendant and the plaintiff. Consequently in this case, bearing in mind the instructions already given, it is for you to determine whether the plaintiff's injuries were occasioned solely by the negligence of the defendant, or solely by the negligence of the plaintiff, or whether they were brought about by the joint negligence of both, in which event you will apportion the plaintiff's damages according to the rule which I have stated to you, and which I stated to you before.

Under the Federal act, however, even though you may find that the defendant was negligent in furnishing the plaintiff with a defective engine which emitted a dangerous amount of steam, which you may consider as bearing upon the question of the defendant's alleged negligence, and even though you may find the operator of the signal tower negligently displayed a green light, indicating a right to proceed, nevertheless if you shall find that the brakeman Mullen stationed at the front end of the caboose gave the plaintiff a signal to stop in time to avoid a collision, and the plaintiff negligently omitted to obey such a signal, then there can be no recovery in this action even under the Federal law, because the plaintiff's negligence in such a case would in law be deemed the sole and proximate cause of the accident. If the defendant in fact
1088 communicated through Mullen such a signal to the plaintiff in time for him to stop, then the acts of negligence prior to that time are of no consequence in this case, for the plaintiff was then bound to observe and obey the signals which he received.

If the jury should find as a matter of fact that the plaintiff was not engaged in interstate commerce at the time of the accident——

Mr. Ward: May I ask if the charge your Honor just made relates to the State act exclusively or to both the State and the Federal?

The Court: In reference to Interstate commerce?

Mr. Ward: In reference to Mullen's signal. Is that in reference to both the State and Federal, or to just the State?

The Court: It relates to both. If the jury should find as a matter of fact that the plaintiff was not engaged in interstate commerce at the time of the accident, as I have already stated to you, different rules of law are to be applied to certain features of the action. The fact that the plaintiff fails to establish an interstate commerce employment will not preclude a recovery under the State law if you should find that he has made out a case under that law. I have already pointed out to you certain of the differences between the two acts. Under the State law any contributory negligence on the

part of the plaintiff himself, any negligence on his part which in any way contributed to the accident, would absolutely pre-
1089 clude a recovery in the action, no matter how much you might find that the defendant railroad company was to blame for the accident. So if the plaintiff is found to have negligently failed to observe the rules and regulations provided for his guidance, for the safety of himself and others, he can not recover in this action.

Another difference between the Federal and State laws is that certain employees of the defendant are deemed fellow employees under the State law, and if their negligence caused the accident, then the railroad company is not chargeable with the negligence of such employees, who are denominated the fellow servants of the plaintiff. But the Federal statute abolishes the fellow servant doctrine, and the negligence of employees of the defendant under the Federal law is chargeable to the employes, to the defendant company. To illustrate, Mr. Mullen, who was the brakeman stationed on the forward end of the caboose, was in law a fellow employee of the plaintiff, and if the accident was caused by his negligence in not giving the proper signal to stop, then Mullen's negligence is deemed the negligence of a fellow servant, a fellow employee, under the State law, and there can be no recovery in this case. This rule, however, has certain exceptions made by the State statute, and the only material exception necessary to be referred to in this case is that of Reithenburg who was operating the signals in tower 55. The State statute makes an exception to the general rule in
1090 his case, and inasmuch as Reithenburg had the direction of the train over the tracks near the point at which he was stationed, so far as his acts are concerned, any negligence on his part is declared by law to be the negligence of his principal, i. e. the railroad company. Consequently, if the collision in question was caused solely by Reithenburg's negligence in giving the wrong signal, then his negligence is not to be deemed the negligence of a co-employee, a fellow servant, but the negligence of the railroad company itself.

Therefore it becomes your duty to bear in mind these important distinctions.

If you should find that the plaintiff was not engaged in interstate commerce, then the questions involved are to be solved under the State laws and its statutes. There are, however, some rules of the common law both under the State and Federal laws which govern and control. And I may repeat that if the dwarf signal showed a purple light as the plaintiff crossed Hertel avenue, then there can be no recovery in this action, for the reason that the defendant gave the proper warning, and there can be no negligence charged against the defendant, but the accident was due solely to the negligence of the plaintiff in not properly observing the signal given, which was not to pass the signal until changed to green unless you shall find that afterwards the signal was changed from purple to green, because that then would present another case, and the plaintiff
1091 would have a right to regard and follow the signal as given. If, on the other hand, the light when the plaintiff crossed

Hertel avenue, or when he was about there, was green, and was an invitation to him to proceed out upon the main tracks, and acting under the general rule and knowledge that the lights would not be changed, the plaintiff proceeded onto the main tracks without warning from anyone to stop, then the defendant was clearly guilty of negligence unless the signal was changed, the lights were changed and the signal given to stop, and Mullen was guilty of negligence in giving him a signal to proceed when he should have been given a signal to stop.

If, on the other hand, the light was set at green when the plaintiff crossed Hertel avenue or was near there, but was subsequently changed to purple, then other facts are to be considered in the determination of whether the plaintiff was guilty of contributory negligence or not. The jury is to take into consideration in such a case the fact as to whether the engine he was operating at the time was emitting steam to such an extent as to prevent the plaintiff from seeing and noticing the change from green to purple—whether he could see the signals given to him by Mullen and the brakeman on the front end of the caboose, whether Mullen in fact gave him a signal to stop, and whether or not Boyle, the other brakeman claimed to be on the engine, called out the presence of the purple signal, and whether or not the plaintiff received any other notice or
1092. warning which a careful and prudent man would or should have observed and obeyed in bringing his train to a stop. If he received such notice from any source then it was the plaintiff's plain duty to stop, and it was negligence to proceed further, and it would preclude a recovery in this action if the notice or the signal was given in time to stop. And in this connection attention should be called to the rule of the company requiring the plaintiff to follow the rule of safety, and when in doubt as to the reading of a signal to take no chances but to stop. That is a reasonable and proper rule, and if at any time the plaintiff was in doubt as to what the signals given were, whether the signal on the dwarf or the signal from the lantern of Mullen, then it became the plaintiff's duty under the rules to stop his engine, and it was negligence to go ahead without ascertaining the meaning of the signals given. Did the plaintiff receive such signals, or was he in doubt as to the meaning and significance of the signals? And did those conditions arise in time for him to stop his engine and avoid the collision which followed? All of these questions are to be taken into consideration by you in determining whether the defendant was guilty of negligence and the plaintiff free from contributory negligence. If the accident was occasioned by the negligence of Mullen in failing to give the proper signal, which misled the plaintiff and caused him to proceed upon the main tracks, and thus brought about the collision, then there can be no recovery in this action under the State law, because Mullen is to be deemed a co-employee of the plaintiff, and not the principal or vice-principal, as before explained.
1093 The *decree* of care to be exercised both on the part of the defendant and of the plaintiff at this time and place was reasonable care, but what is reasonable care depends on the par-

ticular circumstances of every case. It is sufficient to say in this connection that what is reasonable care is determined by the dangers to be apprehended and guarded against. It goes without saying that the gravest dangers are incident to permitting the engine or train to enter upon the main tracks of a railroad at a time when regular passenger trains are expected to be passing, and the dangers to the life and limb of both passengers and train men are so apparent that the utmost precaution should have been exercised by all to prevent and guard against such accidents.

Now, gentlemen, I think I have made clear to you—I have endeavored to do so—the difference between the rules of law that are applicable to this case. If you shall find that this action is subject to the Federal Employers' Liability Act, or the State act, if you shall find from the evidence that the plaintiff has failed to establish that this accident was due to the negligence of the defendant, then you will bring in a verdict for the defendant of no cause of action under either law. If you shall find that the plaintiff has established that the defendant was negligent, but it appears that the plaintiff, as proved by the defendant, who has the burden of proof of establishing the fact of contributory negligence was himself careless, was himself guilty of some negligence which contributed to
1094 the accident, then you will bring in a verdict for the plaintiff under the Federal law for such an amount of damages as you shall find that the plaintiff has sustained, diminished by such sum as shall bear the same relation to the full damages as the negligence attributable to the plaintiff bears to the negligence attributable to both the plaintiff and the defendant. And if you shall find from the evidence that the accident was due entirely, solely to negligence on the part of the plaintiff himself, it will be your duty to bring in a verdict for the defendant of no cause of action. If you shall find, gentlemen, pursuant to these instructions, that the defendant was free from negligence under either law, it will be your duty to bring in a verdict of no cause of action. But if you shall find that the defendant was negligent, and the plaintiff was guilty of some contributory negligence, under the Federal law, then you will bring in a verdict for the plaintiff for such an amount of damages as he has sustained diminished pursuant to the instructions that I have already given you.

And, gentlemen, if you find that the plaintiff is entitled to recover, he is entitled to recover under the State law the full damages; that is, such damages as will compensate him for the injuries which he has sustained, which includes of course compensation for the loss of his leg and the broken leg, the injury to his back, and the other physical injuries which you shall find from the evidence that he has sustained. You should take into consideration in
1095 determining the damages the nature and extent of his injuries, the pain and suffering that he has undergone and may undergo in the future, the permanent character of his injuries, and undertake to give him as full damages, such an amount in money as will be a fair and reasonable compensation to him both for his injuries and for the loss and impairment of his earning

power, the loss of earnings that he has suffered during the past ten years by reason of the accident as disclosed by the evidence, and the loss of his earning capacity in the future.

It has been shown by the Carlisle tables of mortality in evidence that at his present age, 51 years, he has an expectation of life of 20.39 years. Of course this is not an absolutely fixed period of time that he may live. He may die sooner or later. But the Carlisle tables have been made up by insurance companies on the law of average, and you have a right to take them into consideration and to consider that he has expectancy of life of about 20 years. And if you shall find that the plaintiff is entitled to recover under the State act, you will award him full damages, such an amount as will be fair and reasonable compensation to him for the injuries that he has received as the result of this accident.

If you shall find that he is entitled to recover, however, under the Federal law, I repeat, that is to say, under the rules of law of the Federal Employers' Liability Act, applying to this case, and
1096 not the State law, then if you find that he is entirely free from any negligence whatever, he will be entitled also to recover the same amount as specified under the State law; that is, full damages, fair and reasonable compensation for the injuries that he has received. But if you shall find that although the defendant was negligent, but that the plaintiff was himself guilty of contributory negligence, and he is therefore entitled to recover, as you have been instructed, then it will be your duty to first compute the full amount that he would be entitled to, and if his own negligence contributed to the accident, and it was occasioned by the joint negligence of both the defendant and the plaintiff, then you will apportion the damages under the rules I have already laid down, and deduct from the full amount such an amount as you shall find attributable to plaintiff's contributory negligence that is, his contributory negligence as compared with the combined negligence of the plaintiff and the defendant.

Now, gentlemen, I have necessarily occupied an unusual amount of time presenting to you the rules of law which are applicable in this case; and in conclusion I wish to ask you to avoid permitting your determination of any of the questions—to avoid permitting your verdict to be influenced in any way by considerations of sympathy or by consideration of prejudice, or by any preconceived notion that you may have had as to how you would determine an action of this kind. It is your plain duty, and I appeal to you gentlemen to
1097 follow it, to determine this action and determine all the facts entirely upon the evidence as presented on the trial, and to follow the instructions of the court as to the rules of law which are applicable to those facts as you shall find them.

Now, gentlemen, there is one thing further. I have completed my main charge, but the attorneys for the respective parties have the privilege and right not only to take exception to the parts of this charge to which they may not assent, but they also have the right and privilege to present to the court requests, and it is the duty of the court to pass upon these requests to charge by granting, re-

fusing, or modifying them, and charging them then as granted or modified. But, gentlemen, you should bear distinctly in mind that it is your duty to follow and apply to the case only the instructions of the main charge and the requests that are granted or modified as they may be charged. These requests have, at my request, been presented in writing, and I will now proceed to read them to you, and pass upon each of these requests.

First, I will read the requests of the plaintiff. The plaintiff requests that the court shall charge as to Interstate Commerce, first—and I will say in advance that I do make this charge, so that you will know before I read it that I charge it—I have granted this request:

"First: If the jury shall find that the fence or interchanging tracks were used exclusively for cars and trains coming into
1098 the state from Canada, being transferred to the New York Central, or that there were any such cars in the particular train Kinney was proceeding to couple onto and move from Black Rock to East Buffalo, then the jury must find that the defendant was engaged, and plaintiff employed, in interstate commerce at the time of the accident, and in that case the Federal Employers' Liability Act applies."

Mr. Ward: I withdraw the next paragraph. Your Honor has already covered it.

Mr. Spratt: Shall I take the exception as you go along, your Honor?

The Court: Perhaps that would be the best way, taking exceptions as to my passing upon the requests now, and then you can take your exceptions to my general charge after.

Mr. Spratt: I except to that last charge.

Mr. Ward: I withdraw the second. Your Honor has already covered that.

The Court: Yes, the second I think I have covered, so that that is withdrawn. The third, I have granted that. Have I covered that sufficiently in my general charge.

Mr. Ward: Your Honor charged the jury a moment ago that negligence of Mullen, if they found he misled the plaintiff by a false signal, could not be charged to the defendant. Did I understand your Honor to say that applied to the State and Federal Act both?

The Court: No, that was only the State act where he was a fellow servant. Did I misspeak myself in making the charge?

1099 Mr. Ward: I don't think your Honor did.

The Court: I will charge here, granting your request, that under the Federal Employers' Liability Act, the negligence of a fellow servant of Kinney is the negligence of the defendant. I think I have made that clear to you. That is one of the important distinctions in the rules under the separate laws.

The fourth—I have already charged that, I think: "The burden of proving assumption of risk by Kinney is on the defendant". That is granted.

Mr. Ward: I withdraw the fifth. Your Honor has covered that.

The Court: The fifth is withdrawn. I have granted, "If the Federal Employers' Liability Act applies, the case must be determined according to the law controlled by it, and in that case it is a question of fact for the jury to determine whether Kinney assumed the risk inherent in his employment, and also of the negligence of the defendant or of a fellow servant, if such risk is shown by defendant to have been known by plaintiff, or if it were so obvious that it must be presumed that a person of ordinary prudence would have known it."

I think that was embodied in my general charge.

Mr. Spratt: I except to that.

Mr. Ward: I withdraw that request, and I don't ask your Honor to pass on it. That one you have just read I withdraw.

The Court: The sixth, I have granted that also, and will charge it therefore, that "Kinney cannot be charged with the as-
1100 sumption of the risk arising from the defective engine, and from the steam escaping for that reason, unless the defect and the danger arising therefrom were both known to him, or were so obvious that it must be determined that they would be observed and known by a person of ordinary prudence".

Mr. Spratt: I except to that, your Honor.

The Court: I think that was also embodied in my general charge.

Mr. Spratt: Yes.

The Court: To that, you except?

Mr. Spratt: Yes.

The Court: Very well, you may have an exception.

Here is another one which I have granted, the eighth. I am just using the numbers that appear in these requests.

Mr. Spratt: I thought the sixth——

The Court: I guess there is some mistake here. The seventh does not appear on this list. It doesn't make any difference what its number is, this has been requested, and I will charge it, that "even if Kinney knew of the defects in the engine when he started, or discovered them while enroute on his trip, he cannot be charged with assumption of risk, unless he knew and appreciated the particular danger arising therefrom in the obstruction of his vision, and preventing him from seeing the dwarf signal at the critical moment of the accident, or as he approached said dwarf, or unless such danger was so obvious that a person of ordinary prudence must be presumed to have known and appreciated it. And in that
1101 behalf, any evidence that the escaping steam previous to the time that he was approaching the dwarf, did not obscure his vision or prevent him from seeing signals, should be considered by the jury."

That is already in the charge. That is embodied in the charge.

Mr. Spratt: I except to that.

Mr. Ward: I withdraw that particular request because I think your Honor covered it.

The Court: You withdraw it now as a request? I have covered it.

Mr. Spratt: I except to the withdrawal after it has been read and I except to that as charged in the main charge.

The Court: I had only repeated what I already charged. Which do you wish to except to, what I charged in the main charge? Now that this is withdrawn it does not make any difference.

Mr. Spratt: What you charged in the main charge.

The Court: Yes, certainly, you may have an exception to that.

The next is number nine and I have also granted this, as to the assumption of risk, "the true test is not in the exercise of ordinary care to discover dangers by the employe, but whether the defect is known or plainly observable by him. An employee is not charged by law with the assumption of risk arising out of defective appliances provided by his employer, unless his employment was of such a nature as to bring to his attention and cause him to realize and comprehend the dangers incidental to the use of such appliances."

1102 Mr. Spratt: I except to that.

The Court: Then of course you are excepting to the Hervey case, 228 U. S. 319.

It continues, "An employee assumes the risk of dangers normally incident to the occupation in which he voluntarily engages, so far as these are not attributable to the employer's negligence. But the employee has a right to assume that his employer has exercised proper care with respect to providing a safe place to work, and suitable and safe appliances for the work, and is not to be treated as assuming the risk arising from a defect that is attributable to the employer's negligence, until the employee becomes aware of such defect, or unless it is so plainly observable that he may be presumed to have known of it. Moreover, in order to charge an employee with the assumption of risk attributable to the defect due to the employer's negligence, it must appear not only that he knew, or is presumed to have known of the defect, but that he knew it endangered his safety; or such danger must have been so obvious that an ordinary person under the circumstances, would have appreciated it".

Mr. Spratt: I won't except to the case that you read, but I do except to its application to this case.

The Court: This is from the language of the Supreme Court of the United States in the Hall case, 232 U. S. 94. You don't except to the United States Supreme Court, but only to my application of its language in this case?

Mr. Spratt: Yes.

The Court: To that you may have an exception. "Risks

1103 * * * not naturally incident to the occupation, may arise out of the failure of the employer to exercise such care with respect to providing a safe place of work, and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair, and of the risk arising from it, unless defect and risk alike arising are so obvious that an ordinarily prudent person, under the circumstances, would have observed and appreciated them". (Language of the Supreme Court of the United States in the Horton case, 233 U. S. 492).

Mr. Spratt: Yes.

Mr. Ward: I will withdraw the tenth. Your Honor has covered it.

The Court: The next requests relate to contributory negligence.

Mr. Ward: I will withdraw the first. Your Honor has covered that.

The Court: How about the second?

Mr. Ward: I will withdraw the second. Your Honor has covered that.

The Court: And the third, shall I charge that? I have granted it and shall charge it if called upon to do so.

Mr. Ward: Yes, sir, I request that.

The Court: "If Kinney saw the dwarf signal showing green at, or as he approached Hertel avenue, he had the right to proceed, and if such light remained until after Kinney reached a point where he could not see it, and it were afterwards changed by the towerman to purple, the jury can find that Kinney was not
1104 chargeable with contributory negligence, unless he received from Mullen a signal which Kinney understood to be a stop signal, in time for Kinney to avoid the accident by stopping his engine".

That you want an exception to, I suppose?

Mr. Spratt: Yes, certainly.

The Court: You may have it. The fourth, this I have also granted and will charge, and I will pursue that method throughout of saying in advance what I am doing with each one, I having had them before me. It reads, "If Kinney saw the dwarf signal as showing green at, or as he approechad Hertel avenue, and as he proceeded from Hertel avenue towards the dwarf, the escaping steam prevented him from seeing the dwarf signal, but Mullen was giving him the proceed signal, and continued to do so until it was too late for Kinney to stop his engine in time to prevent the accident, the jury can find that Kinney cannot be charged with contributory negligence."

Mr. Spratt: I except to it.

Juror No. 2: There is the point that I think is going to be awful hard to determine, about that signal. You say in there if he continued to see a come-ahead signal, and the signal as given by Mullen that was on the head end of the car [illegible] made a come-ahead signal or a stop signal. Has the jury got to decide on that point of law?

The Court: Not on any point of law. You are to decide the fact.

Juror No. 2: I don't see how you are going to determine it.

The Court: I do not know that I quite understand——

1105 Mr. Ward: The request related to what Kinney saw, not what he was giving.

The Court: I will read it again (reading last request.)

Is that clear now, Mr. Whiting?

Juror No. 2: Yes, sir.

Mr. Spratt: That is, if the jury believe all that.

The Court: I think I have made it pretty clear that the jury are the sole judges of the facts, and they determine the facts from the

evidence which they believe. I don't want to go all through that again. I have granted this fifth request, and will charge it: "Regardless of whether Mullen was attempting to give a proceed or a stop signal, Kinney cannot be charged with contributory negligence for not stopping his engine before he had reached the point where it was impossible to stop it in time to prevent the accident, unless he, from his position, had reasonable ground to doubt whether the signal was a proceed or a stop signal. And in that behalf the jury should consider the evidence that is claimed by Kinney that he saw the dwarf signal as showing green at the last time it was possible for him to see it. That he knew the *possible* for him to see it. That he knew the switches could not be changed until he stopped, and that Mullen stood in such a position behind the caboose from Kinney, so that the signal Mullen was giving, even if it were intended by Mullen to be a stop signal, showed to Kinney only as a proceed signal, and that Mullen maintained his position behind the caboose while giving such signal."

Mr. Spratt: Exception.

Mr. Ward: I withdraw the balance of the requests.

1106 The Court: You except to all of them?

Mr. Spratt: Yes.

The Court: Everything that he has requested which I have charged, I will give you an exception.

Mr. Ward: I also have another request on the subject——

The Court: You ask me to charge it and I have granted it, "The jury has a right to presume that if the defendant has failed to call a witness within its control, who could testify to facts material to those in issue, his testimony, *is* given, would not have been favorable to the defense and in considering the case the jury may consider the fact that the defendant did not call Sauer, the fireman."

Mr. Spratt: To that I except.

The Court: I guess I have charged this next one.

Mr. Ward: Yes, your Honor charged that. I withdraw that.

The Court: So that covers all your requests?

Mr. Ward: Yes. Does your Honor desire me at this time to note such exceptions as I have to your Honor's charge.

The Court: Perhaps it might be well, because may attention being called to an exception I might change my charge.

Mr. Ward: This exception only applies to the Federal Act, and does not apply to the State Act. I except to that portion of your Honor's charge in which your Honor told the jury that there could be no recovery if the purple light was in fact shown to Kinney at Hertel avenue. I have a further exception, which only ap-

1107 plies to the Federal Act and does not apply to the State Act, because I think the charge in both instances is correct under the State Act, that if Mullen gave a stop signal at any time for the plaintiff to stop, and the plaintiff was aware of it, that the plaintiff's acts in failing to stop became the sole negligence, and there can be no recovery; and I ask your Honor in that connection, under the Federal Act, to say to the jury that even if the plaintiff committed that act of negligence or any other act of negligence, if there was con-

curring negligence on the part of the defendant or any of the plaintiff's fellow servants, which produced the accident, the plaintiff could still recover.

The Court: I so charge.

Mr. Spratt: Exception.

Mr. Ward: I feel that I should not in any sense violate the rule which your Honor gave us about handing up our requests, but in your Honor's charge to the jury about what would constitute interstate commerce, would your Honor indicate to the jury the effect of a single interstate car in that train?

The Court: Why, if there is one or more cars, that is an interstate train. That is what you want?

Mr. Ward: Yes.

Juror No. 9: Would that apply to cars, or would it also apply to L. C. L. where it is broken packages less that carload shipments? Some cars contain a mixed shipment.

The Court: Any cars that are engaged in transporting interstate freight in a small amount or a great amount, in any car. If any such car was in a train it would create an interstate train.

1108 Juror No. 12: Even if one car?

The Court: Even if it was only one car.

Juror No. 9: Or less than a car, or part of a car?

The Court: Of course, when I say "car" I mean the structure known as a car with something in it, whether there is a large amount in it or a small amount in it.

Mr. Ward: I think Mr. Kirby has in mind an interstate shipment, where there was a single interstate shipment in any car. I would ask your Honor to charge that a single interstate shipment in a car makes an interstate car.

The Court: I so charge.

Now I have here the requests of the defendant in writing, and I have granted practically all of them, and will read them to you. The first request is, "That the jury be instructed to make special finding as to whether or not plaintiff was engaged in interstate commerce at the time of the accident." I have already done that and will hand to you a written paper upon which I would give your answer, and the question that I have written down for a special finding is, "Were the plaintiff and defendant engaged in interstate commerce at the time of the occurrence of the accident?" And you will write under that "yes" or "no" as you may find, and sign your name on this paper which I shall hand to you.

Now, the second request of the defendant, "That even though the jury finds that the light on dwarf 6 was green when Kinney claims to have seen it, that as he approached it, and before he passed

1109 it, it was still his duty to continue to make observations as to the color of the dwarf signal." I have granted that.

The third I have granted and I will read, "That even though the jury finds that the light of dwarf 6 was green when Kinney claims to have seen it, that if before he reached or passed it it was changed to purple, or danger, that it was his duty to stop."

Mr. Ward: I desire to except. Does your Honor mean that it was his duty to stop if he knew it——

The Court: I mean if he saw the signal.

Mr. Ward: The request, if your Honor will——

The Court: They may be mysteriously worded, some of them, but——

Mr. Spratt: I think they are very plainly worded. There isn't meant to be any mystery about them.

The Court (reading): "That even though the jury finds that the light on dwarf 6 was green when Kinney claims to have seen it, that if before he reached or passed it it was changed to purple, or danger," —I suppose you can insert there that he saw it——

Mr. Spratt: Or ought to have seen it.

The Court: Or ought to have seen it. I will put it that way. "— that it was his duty to stop."

Mr. Ward: Yes, I consent to that as amended.

The Court: Fourth: "That under the State law if the plaintiff was guilty of any negligence which in the slightest degree contributed to the accident, he cannot recover, even though the jury finds that the defendant was guilty of some negligence."

1110 That is elementary and is granted.

Fifth, "That under the State law if the accident was caused by Mullen's negligence in not giving Kinney the proper stop signals, it was the negligence of a fellow servant, and that there can be no recovery."

I have charged that already, under the State law, but I have pointed out to the jury the difference in the law governing an employee under the Federal act and under the State act.

Sixth, "That under the facts disclosed on this trial, the furnishing by the defendant of an engine which leaked steam cannot be considered by the jury as evidence of actionable negligence on its part in this case."

I am going to add to that, that this request must be declined or modified. I am willing to charge that the jury may determine whether or not from the evidence an engine which was defective and leaked steam to such an extent as to be dangerous, and to obscure the vision of the plaintiff, was furnished the plaintiff on this occasion. If so, it may be considered as evidence of actionable negligence.

Mr. Spratt: I except to the refusal of the court to charge as requested and to the charge as made.

The Court: The next one I have granted without any change "that under the——

Mr. Spratt: The seventh, I withdraw that.

The Court: Then I will pass the seventh. The eighth, I have granted that, and it has already been charged, I think. Just glance over that. Perhaps you don't ask for them.

1111 Mr. Spratt: I withdraw that.

The Court: The ninth I will grant that.

Mr. Spratt: I withdraw that.

The Court: The tenth, I have granted. Shall I charge that?

Mr. Spratt: I am in a little doubt about that. I would like to have your Honor charge it.

The Court: I think I have already charged the proposition pretty clearly, but I will charge it again, "That if Kinney was in doubt as to the color of the light on dwarf No. 6, whether it was green or purple, it was his duty to stop before passing it." That is under the rule to which I have drawn the jury's attention.

The eleventh, I have granted that also, "That if Kinney could not see the dwarf light and was depending entirely on Mullen's signal and was in doubt as to whether Mullen's signal was a come-ahead or a stop signal, it was his duty to stop before passing the dwarf, and if he failed to do so, he was negligent." That is granted.

Mr. Spratt: I withdraw twelve and thirteen.

The Court: Fourteen, "That if at any time Kinney was in doubt as to what the signals given were, whether the signal from the dwarf or the signal from the lantern of Mullen, then it was his duty under the rules to stop." That is pursuant to the rule which has been drawn to the attention of the jury.

The fifteenth, I have granted.

Mr. Spratt: That is also withdrawn.

The Court: The sixteenth I have granted.

Mr. Spratt: I would ask that.

1112 The Court: "That the jury must not speculate as to the interstate composition or character of cars in the train plaintiff's engine was on its way to draw, but must find by a fair preponderance of the evidence that there were in fact interstate cars in said train. That they have no right to guess on this question." I think I charged in my main charge that that must be determined by a preponderance of evidence.

Seventeen, shall I charge that?

Mr. Spratt: Yes.

The Court: "That there is no presumption that plaintiff was engaged in interstate commerce at the time of the accident."

Eighteen——

Mr. Spratt: I withdraw that.

The Court: Nineteen——

Mr. Spratt: I withdraw that.

The Court: Twenty——

Mr. Spratt: I will ask that.

The Court: I will grant that with a slight modification, I think. It reads, "That if the lantern signals which the plaintiff saw Mullen give were seen by him to extend from the horizontal line of Mullen's outstretched arm, and to disappear each time on the downward swing, past the vertical line of Mullen's body and the righthand corner of the caboose"—the way it was drawn here it was that "the jury must find that Kinney received the stop signal and that he should have recognized it as such." I will not charge the latter part. I will say that the jury may find from the evidence

1113 which they believe that Kinney received the stop signal and that he should have recognized it as such.

Mr. Spratt: Exception.

The Court: In other words, I leave it to the jury to determine.

Mr. Spratt: Exception to the court not charging as requested.

The Court: Yes. The twenty-first, that I have also modified. I will charge as modified and will first read the charge as requested, "That if the plaintiff had notice on his first trip to Tonawanda that the escape of steam from the engine would interfere with his taking dwarf signals, and he did not exercise his privilege of sidetracking his engine, or securing another engine on his return to East Buffalo, but started on his trip to Black Rock, that he assumed the risk of the continued leaking of steam at the time of the accident."

That I will find as requested with this modification, that if Kinney knew of the defects in the engine when he started or discovered them while en route on his trip, he cannot be charged with assumption of risk unless he knew and appreciated the particular danger arising therefrom in the obstruction of his vision in preventing him from seeing the dwarf signal at the critical moment of the accident, or as he approached the dwarf, or unless such danger was so obvious that a person of ordinary prudence must be presumed to have known and appreciated it, and in that behalf any evidence that the escaping steam previous to the time that he was approaching the dwarf did not obscure his vision or prevent him from seeing the signals, should be considered by the jury.

1114 Mr. Spratt: An exception to the refusal of the court to charge as requested.

The Court: The next one is twenty-two, which I grant as requested.

Mr. Spratt: I withdraw that.

The Court: Twenty-three, I have granted that also.

Mr. Spratt: If the court please, on re-consideration I would like to have you read twenty-two and twenty-three.

The Court: I have granted them both. Twenty-two, "That if when Kinney started to proceed with his engine from Tower "I" to Tower 55 against the current of traffic, he was aware of the fact that the steam from the engine was enveloping and would so envelop the engine that it would interfere with his seeing either the dwarf signal, or Mullen's signals, or both, and he continued on with the steam enveloping his engine and interfering with his view of the signals, that he assumed the risk of any injury resulting because of the steam escaping from the engine." I have granted that.

Mr. Spratt: I withdraw twenty-three.

Mr. Ward: Just a moment. Does that mean that he couldn't see both or does it mean that he could only see one?

Mr. Spratt: It would apply to his view, either one or the other.

Mr. Ward: Then I except to it on the ground that he had a right to rely on Mullen's signal if he saw it and could not see the other. I think your Honor has already charged that.

1115 The Court: I think I have. You have withdrawn twenty-three?

Mr. Spratt: Yes.

The Court: Twenty-four is the next request.

Mr. Spratt: I withdraw twenty-four.

The Court: Twenty-five, I charge that. I grant it.

Mr. Spratt: I withdraw that too.

The Court: Now, twenty-six, that I have granted as modified, so

that I will read that, "That if the jury find that Kinney was relying solely on Mullen's hand signal, and if they find further that Mullen was not negligent in the manner in which he gave the hand signal, and that his signal was in fact a stop signal, and that the steam escaping from the engine did not interfere with Kinney's observation of Mullen's signals, and that the defendant was not negligent in any other respect claimed, then if Kinney was uncertain as to whether Mullen's signal meant a stop signal or a come-ahead signal, the failure of Kinney to stop before passing the dwarf must be considered contributory negligence, which was the sole cause of the accident and which bars a recovery."

I have granted this request, but I will modify it in this way, that I will not say that the action of Kinney under those circumstances must be considered contributory negligence, for as I have already charged, that contributory negligence is the negligence of the plaintiff which concurring and co-operating with the negligent act of the defendant is the proximate cause of the accident resulting
1116 in plaintiff's injury. But such action on his part in that case would be the sole negligence which caused the accident.

Mr. Spratt: Exception to the refusal of the court to charge as requested.

The Court: Now comes twenty-seven. That I have modified. The request is, "That if the jury find that Kinney was uncertain as to whether Mullen's signal was a stop signal or a come-ahead signal, and that Mullen's signal was in fact a proper stop signal, and that the defendant was not negligent in any other respect claimed, then the failure of Kinney to stop before passing the dwarf must be considered contributory negligence, which was the sole cause of the accident and which bars a recovery."

Mr. Ward: I consent to that.

The Court: You consent to that without modification?

Mr. Ward: Yes.

The Court: So that we will let that stand. You are so charged.

Twenty-eight is the next. I have granted it. It reads, "If Mullen's hand signals were properly communicated to Kinney and showed a proper stop signal, the defendants cannot be charged with liability solely because Kinney misinterpreted the signal." I will grant that.

The next two, twenty-nine and thirty, relate simply to the question of the statute of limitations, and I will read them together. I have refused them both. They are as follows: "That the jury must find a verdict for the defendant if they find that plaintiff
1117 was engaged in interstate commerce and that the Federal act applies, upon the ground that the date of the injury antedated the amended complaint by over two years, and that the cause of action under the Federal statute is barred by the statute of limitations contained in said act." "That there is no evidence in the case from which the jury can find that the plaintiff was engaged in interstate commerce at the time of the accident."

Those I have refused.

Mr. Spratt: I take exception to the ruling on both.

The Court: And I will say to the jury that this very question of the statute of limitations was considered by the court when an application was made to amend the plaintiff's complaint and permit the plaintiff to bring his action also under the Federal Employers' Liability Act, and was determined by the court, and its determination is reported in 98 Miscellaneous Report at page 11, and it was afterwards affirmed by the Appellate Division, 177 A. D. 941. No more requests, as I understand it?

Mr. Ward: No more on the part of the plaintiff.

The Court: Are there any further exceptions at this time on the part of the plaintiff?

Mr. Ward: No.

The Court: There are no further requests on the part of the defendant, as I understand it, but there are certain exceptions which the defendant desires to take to the charge. And I will say
1118 to the jury finally that they are not to consider exceptions in any way. They are to consider only the charge as made, those stand as the instructions of the court, and in addition the jury should take as instructions of the court the requests which were granted or modified.

Mr. Spratt: I have two or three requests which were suggested by Mr. Ward's remarks in summing up. That no defects in the engine were proved which required the engine to be taken out of service under the rule of the Public Service Commission.

Mr. Ward: That is a question of fact.

The Court: I am going to leave that for the jury to determine, and therefore give you an exception.

Mr. Spratt: Exception.

The Court: I am not going to determine any question of fact here. I am not going to usurp the province of the jury. I endeavor not to do it.

Mr. Spratt: I request the court to charge that no negligence can be predicated because there was no crossover switch onto the westbound main track.

Mr. Ward: I accept.

The Court: Mr. Ward agrees, and I shall charge it therefore.

Mr. Spratt: Mr. Ward commented on it in his summing up, and that is the reason I requested it. I request the court to charge that neither the defendant nor Boyle can be charged with negligence because Boyle under the circumstances did not assume control of the engine.

1119 The Court: I will charge that. It was not his duty to assume control of the engine.

Mr. Ward: I except.

Mr. Spratt: I ask the court to charge that there is no claim that the defendant was negligent because the green and purple lights were used to indicate clear and danger.

The Court: Do you mean as to the colors?

Mr. Spratt: Yes, as to the colors.

The Court: Whether they ought to be yellow?

Mr. Spratt: Yes. Mr. Ward commented on it in his summing up.
The Court: I so charge. The defendant had the right to select its own colors.
Mr. Spratt: Now I have a few exceptions. First, I except to the submission of the case to the jury under the Federal law.
The Court: Yes.
Mr. Spratt: Second, I except to the submission at the same time of the case to the jury under the State Employers' Liability Act.

Third, I except to the court's submission of the case to the jury on the ground that it is improper for the court to direct the jury that it may find on the one hand from the evidence in the case that the defendant is liable to the plaintiff under the Employers' Liability Act of the United States, and on the other that the jury has a right to ignore said evidence and find the defendant liable to the plaintiff under the laws of the State of New York.

Fourth, we request the court to compel Mr. Ward to elect whether the plaintiff stands upon the Federal or State laws.

The Court: The court declines.
1120 Mr. Spratt: Exception.
The Court: Is that all?
Mr. Spratt: That is all.
Juror No. 2: May I ask one question of Brother Spratt? It is this, if the books that Conductor Mattern had of his trains that he put onto that siding, if they were burned the same as the reports of the conductor, that he claimed, at Depew; if it did it will save sending word up to you. We would like that conductor's train book which would assist us.
The Court: Was that put in evidence?
Mr. Ward: We asked for it.
The Court: You can only have what was put in evidence.
Mr. Spratt: Those were the records which were destroyed.
Mr. Ward: That is his private book of record. There is no claim that was destroyed.
Mr. Spratt: We have produced every record which would show who the conductor was or anything about it.
The Court: The jury may now retire.

Thereupon at 12.20 o'clock p. m. the jury retired for deliberation.

At 4.15 p. m. the jury returned to the court room for further instructions.

The Court: Now, gentlemen, I have a note which has been handed to me from you, which requests further instructions, and I will read what was sent to me.
You say, "In the event that the jury find for Mr. Kinney under the Federal Employers' Liability Act, and also find that Kin-
1121 ney was guilty of contributory negligence, is it the duty of the jury to first find the amount due Kinney, second, assess the contributory damage, and, third, deduct the contributory dam-

age and report the net amount due Mr. Kinney?" I will simply respond to that inquiry, yes. I might explain it a little further, that you are required, in the first place, to compute the full damages that you would give Kinney in the event that there was no contributory negligence, finding the damages based on the evidence in accordance with the instructions that I gave you, and what you are to consider in estimating full damages; that is, the full amount that would be a fair and reasonable compensation to him, and then after you have got that amount computed as the full damages it will be your duty to find, if you find that he was chargeable with contributory negligence, an amount for contributory negligence which shall be attributable to the plaintiff for his contributory negligence as compared to the combined negligence of the plaintiff and the defendant. In other words, you will compute then what the proportionate amount is that you should deduct for such contributory negligence as you find that he is chargeable with, and, then I answer the third inquiry, that you should deduct that amount from the full damages which you have found and report the balance as a net amount due to Mr. Kinney and render that in your general verdict. Is that clear or is there any further inquiry?

Juror No. 2: I think it is clear to me, your Honor.

1122 The Court: To all of you gentlemen? Very well, you may retire and we will be here to receive your verdict.

Thereupon the jury retired for further deliberation.

At 4.45 p. m. the jury returned to the court room.

The Clerk: Gentlemen of the jury, have you agreed on a verdict?

The Foreman: We have.

The Court: First, gentlemen, how do you find on the special finding?

(Paper handed to Court.)

The Court: To the request for a special finding as to whether or not the plaintiff and defendant were engaged in interstate commerce at the time of the occurrence of the accident, you find, "Yes?"

The Foreman: Yes, sir.

The Court: And you find then a verdict for the plaintiff, in favor of John W. Kinney, under the Federal Employers' Liability Act, fixing the total amount of the damages at $40,000?

The Foreman: Yes, sir.

The Court: And you find that Mr. Kinney was guilty of contributory negligence, and fix the amount of such negligence at $8,000, and therefore you find a general verdict for the balance for the net amount, $32,000?

The Foreman: We so agree.

The Court: And that is the verdict that you find all of you, is it, a verdict for $32,000?

The Foreman: Yes.

1123 The foregoing is all the evidence taken and proceedings had upon the trial of this action and because the same does not appear of record the defendant has caused the foregoing case and exception to be prepared to the end that this case may be further considered by this court.

HOYT & SPRATT,
Attorneys for Defendant.

Notice of Appeal from Order Granting Additional Allowance.

Supreme Court, Erie County.

JOHN W. KINNEY, Plaintiff,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, Defendant.

SIRS:

Please take notice that the defendant in the above entitled action hereby appeals to the Appellate Division, Fourth Department, from an order made herein on the 4th day of April, 1919, and entered in the office of the Clerk of the County of Erie on the same day, providing that the plaintiff have an additional allowance of five per cent (5%) on the verdict of Thirty-two thousand Dollars 1124 ($32,000.00), in addition to the usual costs of the action, and that judgment be entered accordingly. And the defendant appeals from each and every part of said order and from the whole thereof.

Yours, etc.,

HOYT & SPRATT,
Attorneys for Defendant.

Office & P. O. Address, 810-826 Fidelity Bldg., Buffalo, N. Y.

To Hamilton Ward, Esq., Attorney for Plaintiff, and to the Clerk of the County of Erie.

Order Granting Additional Allowance and Notice of Entry.

Supreme Court, Erie County.

JOHN W. KINNEY, Plaintiff,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, Defendant.

The above entitled action having come on for trial in Part 1125 VI of the Supreme Court, before Hon. Herbert P. Bissell, Justice, and a jury, and on the — day of February, 1919, a verdict having been rendered in favor of the plaintiff and against the defendant in the sum of Thirty-two thousand dollars ($32,-

000.00), and a motion for a new trial having been made and denied, and a motion having been made by the plaintiff, upon the affidavit of Hamilton Ward, verified the 18th day of February, 1919, and upon all the papers and proceedings in the action, for an order directing that an extra allowance of costs be made in this action, in addition to the usual costs, and Maurice C. Spratt appearing for the defendant in opposition thereto, and filing an affidavit verified the 3d day of March, 1919, and due deliberation having been had thereon.

Now, on motion of Hamilton Ward, attorney for the plaintiff, it is

Ordered, that the motion be, and the same hereby is granted, and that the plaintiff have an additional allowance of five per cent on the verdict of Thirty-two thousand dollars in addition to the usual costs of the action, and that judgment be entered accordingly.

HERBERT P. BISSELL,
J. S. C.

Granted April 4th, 1919.
RUSSELL B. CLARK,
Sp. Dep. Clerk.

1126 SIR:

Please take notice that an order of which the within is a true copy was this day entered in the within entitled action in the office of the Clerk of Erie County, at Buffalo, N. Y.

Dated, Buffalo, N. Y., Apr. 7, 1919.

Yours, etc.

HAMILTON WARD,
Attorney for Plaintiff.

Office and Post Office Address, Rooms 104-106-109 Erie Co. Sav. Bk. Bldg., Buffalo, N. Y.

To Maurice C. Spratt, Atty. for Defendant.

Notice of Motion.

Supreme Court, Erie County.

JOHN W. KINNEY, Plaintiff,

VS.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Defendant.

SIRS:

Take notice: That upon the affidavit of Hamilton Ward,
1127 dated February 18th, 1919, and upon all the records and proceedings in this action, the plaintiff will move the court, at a term thereof to be held at the City and County Hall, in the City of Buffalo, N. Y., on the 24th day of February, 1919, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, be-

fore the Hon. Herbert P. Bissell, in Part IV, for an order directing that an extra allowance be made to him in addition to the usual costs.

Dated, February 18, 1919.

HAMILTON WARD,
Attorney for Plaintiff.

Office & P. O. Address, 104-105 Erie County Bank Bldg., Buffalo, N. Y.

To Locke, Babcock, Spratt & Hollister, Attorneys for Defendant.

1128 *Affidavit of Hamilton Ward in Favor of Motion.*

Supreme Court, Erie County.

JOHN W. KINNEY, Plaintiff,

VS.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Defendant.

STATE OF NEW YORK,
County of Erie,
City of Buffalo, ss:

Hamilton Ward, being duly sworn, deposes and says that he is the attorney for the plaintiff in the above entitled action; that this is a motion made for the purpose of obtaining an order granting to plaintiff's attorney an extra allowance under Section 3254 of the Code of Civil Procedure.

That the following is a brief synopsis of the various steps and proceedings had from time to time since said action was commenced, viz:

Feb. 1909.—Notice of Claim under Chapter 600, Laws of 1902 served on defendant.

June 30, 1909.—Summons and complaint served on defendant.

1129 Aug. 5.—Received answer of defendant by mail.

Aug. 18.—Notice of Trial served.

Aug. 20.—Note of Issue filed.

Feb. 4, 1910.—Case moved for trial, Part II, Judge Emery.

Feb. 11.—Jury brings in sealed verdict for Twenty thousand dollars.

July 29. Order served granting motion for new trial.

Sept. 15.—Notice of trial served.

Sept. 19.—Filed note of issue for October Term.

Dec. 14.—Notice to Produce served on Defendant's attorneys.

Jan. 3, 1911.—Case moved for trial, Part II, Judge Lambert.

Jan. 12.—Jury brings in sealed verdict for Twenty-three thousand dollars.

Jan. 24.—Motion for new trial denied.

Jan. 25.—Judgment entered, $23,000.00 damages; $255.68, costs; total, $23,255.68.

1130 Feb. 1.—Order entered denying motion for new trial.

Mar. 1.—Received Notice of Appeal to Appellate Division from order denying motion for new trial.

Mar. 28.—Judgment and Bill of Costs served on defendant.

Apr. 8.—Received Notice of Appeal from Judgment

Apr. 11.—Served affidavit and notice of motion to declare defendant's right to appeal abandoned.

Apr. 17.—Order granted declaring defendant's right to make and serve case on appeal abandoned unless same is served by May 26th, 1911.

June 22.—Received proposed case and exceptions.

June 24.—Received amendments to defendant's proposed case.

June 27.—Received notice of settlement of case and exceptions for July 7th, 1911.

July 13.—Stipulation signed settling case and exceptions.

1131 Sept. 14.—Notice of motion to dismiss appeal served on defendant's attorneys.

Sept. 14.—Notice of Argument for September term served on defendant's attorneys.

Sept. 14.—Note of issue for September term mailed to Clerk of Appellate Division.

Sept. 26.—Motion to dismiss appeal argued at Appellate Division.

Sept. 26.—Order granted by Appellate Division dismissing defendant's appeal unless printed case filed and served by October 2, 1911.

Oct. 3.—Received three copies of appeal book from defendant's attorneys.

Oct. 16.—Received order to show cause at Appellate Division why time to file brief, etc., should not be extended.

Oct. 17.—Order granted extending time to file and serve brief to November 2, 1911 and argue appeal by November 15, 1911.

Oct. 21.—Order of October 17, 1911 served on defendant's attorneys.

Oct. 30.—Received notice of argument for November term, Appellate Division.

1132 Nov. 2.—Received three copies of defendant's brief.

Nov. 3.—Notice of Argument for November Term of Appellate Division served on defendant's attorneys.

Nov. 15.—Case argued at Appellate Division.

Feb. 2, 1912.—Received copy of order, Appellate Division, reversing judgment.

Mar. 18.—Notice of Trial for April Term served.

Oct. 15.—Case moved for trial, Part II, Judge Pooley.

Oct. 25.—Jury brings in sealed verdict of Twelve thousand dollars.

Nov. 11.—Motion for new trial denied.

Nov. 14.—Order denying new trial entered and served on defendant's attorneys.

Nov. 14.—Judgment entered. Damages, $12,000.00; costs, $379.22; total, $12,379.22.

Nov. 14.—Copy of judgment and notice of entry served on defendant's attorneys.

Nov. 19.—Received Notice of Appeal from judgment to Appellate Division.

1133 Nov. 20.—Order granted on stipulation vacating order denying motion for new trial entered November 14, 1912.

Feb. 7, 1913.—Received proposed case and exceptions.

Feb. 12.—Served amendments to proposed case and exceptions.

Mar. 17.—Order settling case and exceptions served on defendant.

Apr. 11.—Motion made to declare defendant's right to serve printed case vacated and abandoned adjourned to April 18, 1913.

Apr. 18.—Motion held to April 21st, 1913.

Apr. 19.—Served Notice of Argument for April Term.

Apr. 29.—Motion made at Appellate Division to dismiss appeal.

May 2.—Order granted dismissing appeal. Appellant to appear before Pooley, Judge, and serve brief on or before May 9th, 1913.

May 21.—Case argued at Appellate Division.

June 11.—Order affirming judgment, with costs.

June 17.—Judgment of affirmance entered.

1134 June 17.—Received Notice of Appeal to the Court of Appeals.

Mar. 31, 1914.—Mailed Notice of Argument, Clerk, Court of Appeals for May term.

Jan. 25, 1916.—Case argued, Court of Appeals.

Feb. 29.—Order granted at Court of Appeals directing new trial.

Mar. 9.—Notice of Motion, affidavits, etc. for leave to serve amended complaint served on defendants.

Mar. 24.—Received copy of order, remittitur and judgment reversing judgment and granting new trial.

Apr. 15.—Notice of trial served.

Dec. 5.—Order granted permitting amendment of complaint.

Dec. 7.—Copy of order served on defendant's attorneys.

Dec. 22.—Received notice of appeal to Appellate Division from order amending complaint.

Jan. 8, 1917.—Received three copies of record on appeal.

1135 Jan. 29.—Order granted denying defendant's motion for a stay of proceedings.

Feb. 15.—Answer to amended complaint served.

Feb. 22.—Amended answer to amended complaint served.

Feb. 28.—Received Notice of Appeal to Appellate Division from order denying stay of proceedings.

Mar. 7.—Appeal from order argued, Appellate Division.

Mar. 12.—Case moved for trial, Part VI, Brown, Judge.

Mar. 23.—Jury report disagreement.

Mar. 20.—Served copy remittitur affirming order entered December 7, 1916.

Mar. 20.—Served judgment of affirmance on defendants.

Apr. 30.—Case moved for trial, Part VII, Wheeler, Judge.

May 10.—Jury bring in sealed verdict, no cause of action, and special verdict that plaintiff was engaged in interstate commerce.

June 5.—Briefs submitted on motion for new trial.

1136 June 27.—Affidavits and notice of motion to take evidence of Rourke and Powell served on defendant's attorneys.

Aug. 22.—Received copy of order denying motion for new trial.

Sept. 12.—Notice of appeal to Appellate Division from order denying motion for new trial.

Oct. 3.—Served and filed Notice of Appeal from judgment to Appellate Division.

Feb. 1, 1918.—Served three copies of appeal book.

Feb. 14.—Served Notice of Argument for March Term.

Feb. 19.—Served three copies of brief.

Mar. 5.—Order granted directing defendant to file brief by March 15th, 1918.

Mar. 15.—Received Order to show cause why case should not go over term.

May 4.—Received three copies of brief.

May 11.—Served three copies of brief on defendant's attorneys.

July 2.—Order granted by Appellate Division reversing judgment and ordering new trial.

1137 July 13.—Entered judgment of reversal.

Aug. 19.—Served Notice of Trial for September Term.

Jan. 27, 1919.—Sixth trial commences, Part VI, Bissell, Judge.

Feb. 7.—Jury rendered verdict in favor of plaintiff for Thirty-two thousand dollars.

Deponent further says that the above entitled action has been tried six times and that said trials lasted from nine to eleven days each; that five appeals were taken to the Appellate Division and one appeal to the Court of Appeals; that on the first trial, before Mr. Justice Emery, a verdict was rendered for Twenty thousand dollars, which was afterwards set aside, on motion, and a new trial granted; that on January 23d, 1911, said case was again tried before Mr. Justice Lambert, and a verdict rendered for Twenty-three thousand dollars; that on January 24th, 1911, defendant's motion for a new trial was denied and from the order denying defendant's motion an appeal was taken on March 1st, 1911 to the Appellate Division, which reversed the judgment and order of the Trial Term; that on October 15, 1912, the case was again tried before Mr. Justice Pooley, and a verdict rendered for Twelve thousand dollars; that a motion for a new trial was denied on November 11, 1912; that an appeal was taken from this judgment and order denying motion
1138 for a new trial to the Appellate Division, which affirmed said judgment and order; that on June 17, 1913, defendant took an appeal from the judgment of the Appellate Division to the Court of Appeals, and that said court, on February 24th, 1916, reversed the Appellate Division and granted a new trial; that on December 5, 1916, on motion of plaintiff, an order was granted by Mr. Justice Bissell amending plaintiff's complaint, and from this order defendant appealed to the Appellate Division, which affirmed said order on March 20th, 1917; that on May 10th, 1917, the case was

tried for the fifth time, and a verdict of no cause of action was rendered; that from the judgment entered on said verdict and from an order denying plaintiff's motion for a new trial, an appeal was taken to the Appellate Division, which reversed the Trial Court and granted plaintiff a new trial; that the sixth and last trial was had on January 27th, 1919, and a verdict was rendered for Thirty-two thousand dollars.

Deponent further says that on six different occasions, as shown by the above record, he has been obliged to move for a dismissal of defendant's appeal for failure to serve case and exceptions and briefs.

That among the various problems in this action were railroad construction, involving the operation of interlocking automatic signals, boiler and engine construction, and what constituted proper repair, and the practice and method of giving signals; that in order
1139 to make necessary proof of the various questions involved, plaintiff was obliged, to a large extent, to get the facts from defendant's employees, and that many of plaintiff's witnesses were in the employ of the defendant and hostile to the plaintiff.

Deponent further says that many difficult and troublesome questions of law were involved; that on the first trial before Justice Emery, the question of vice-principal under the Barnes Act was involved, and after a trial was had, and a verdict rendered in plaintiff's favor, Justice Emery, under the rule laid down in Mallack v. N. Y. C. & W. R. Co., (197 N. Y., 450) decided after the verdict granted a new trial, and a new trial was accordingly had before Mr. Justice Lambert, and a verdict rendered in favor of the plaintiff for Twenty-three thousand dollars.

Deponent further says that after the third trial, which resulted in a verdict for Twelve thousand dollars, and which was afterwards reversed by the Court of Appeals, a motion was made for an order permitting plaintiff to amend his complaint, setting up the fact that he was engaged in interstate commerce at the time of his accident; that it was claimed by defendant that such amendment violated Section 6 of the Employers' Liability Act, which provides that "No action shall be maintained under this Act unless commenced within two years from the date the cause of action accrued." That
1140 defendant also argued that plaintiff was guilty of gross laches in moving for the amendment, but Mr. Justice Bissell, in granting the motion, stated "that while the Federal Employers' Liability Act was adopted a short time before the commencement of this action, the application of the statute was not understood by the profession generally until developed by various decisions of the court. It was unsettled until comparatively recently what is and what is not interstate commerce."

The fact that Kinney's ultimate purpose was to move an interstate train, and thereby further interstate commerce movements was not held by the highest United States Court to invest his previous acts with an interstate character until the decision in N. Y. C. & H. *H.* R. R. Co. v. Carr, (238 U. S., 260; 35 S. C. E. 780), decided June 14, 1915. In this case the present counsel were engaged, and upon its decision it became fairly clear that Kinney was engaged

in interstate commerce, which was definitely settled in L. & N. R. Co. v. Parker, (242 U. S., 13; 37 S. C. R., 4), decided November 13th, 1916. Furthermore, there was grave doubt about the Federal statute being exclusive. Deponent was content to try the case under the State Act if he could, but the United States Supreme Court in Seaboard Airline Co. v. Horton, (233 U. S., 492; 34 S. C. R., 635) finally held in 1914 that if the parties were engaged in interstate commerce, the State liability was superseded, and the Supreme Court restated this view in Slavin v. R. R. Co., (236 U. S., 454; 35
1141 S. C. R., 306), decided February 23d, 1915, even in a case where the pleadings contained no reference to interstate commerce. It, thus, was in the power of the defendant to prove interstate commerce, and if the action was not under the Federal Act, to procure its dismissal. That amendment, therefore, not only was proper, but necessary and it was sought as soon as the Federal Courts had decided the question.

And deponent further alleges that this action is both difficult and extraordinary both as to the facts and the law and offers as a part of the motion papers, the records and briefs used on the trial of the various actions. That when the action was commenced it was apparently governed by the Barnes Act, Chapter 657 of the Laws of 1906, which modified the fellow-servant rule of the common law and provided that railroad employees "who have as a part of their duty for the time being, physical control or direction of the movement of a signal, locomotive, engine, etc., are vice-principals."

The negligence relied on in this action was of three kinds; the furnishing to the plaintiff of an engine which leaked steam, the failure of the automatic signals through their defects or the negligence of their operators, and misleading signals by the head-end brakeman.

At the time of the trial it was the law, as set out in Hallock v. N. Y. & O. W. R. R., 132 A. D. 943, and other cases that
1142 the statute applied to the rear end brakeman and the Trial Court so charged. The Court of Appeals, however, reversed the Hallock case and wrote an opinion, 197 N. Y. 450, holding that the head-end brakeman was not a vice-principal. This necessitated a setting aside of the verdict and a re-trial.

Again at the time of the argument of the appeal from the second trial before Mr. Justice Lambert, it was urged by the defendant that the plaintiff was guilty of contributory negligence as a matter of law, in reliance on the decision in the Dunn case 149 A. D. 932, a case which seemed parallel in facts and law to the Kinney case, and which was brought to the court's attention by the appellant. Following this decision two members of the court thought the plaintiff was guilty of contributory negligence as a matter of law, while the majority of the court held that the verdict was against the weight of evidence on this subject and ordered a new trial. But for the decision in the Dunn case, deponent believes that the second verdict would have been unanimously affirmed. However, the Dunn case stood in the way. The Dunn case was then taken to the Court of Appeals and by the time the Kinney case came up for a third trial,

the Dunn case had been reversed, the Court of Appeals holding that the question of contributory negligence in such a case was for the jury, 208 N. Y. 344.

After the third trial before Justice Pooley there appeared
1143 in the record the error discussed in the Court of Appeals, and which resulted in a reversal, 217 N. Y. 325. The defendant's counsel requested: "If the accident was due to the sole negligence of Mullen, in transmitting signals, it was the negligence of a fellow-servant, and there can be no recovery." But the court refused and to which exception was taken. This presented the same question that had been presented after the first trial and which had been decided by the Hallock case. It was clear error, committed through no fault of the plaintiff. Plaintiff offered to stipulate a new trial on this ground and the Trial Court refused. Plaintiff again took the position at the Appellate Division that a reversal on this ground alone will be proper, but the defendant did not urge this as a ground of reversal in his oral argument.

Nearly two years was required to get the case through the Court of Appeals where the error was urged as a ground of reversal and a new trial granted solely on that ground. As was stated by Mr. Justice Bissell in his opinion in 98 Misc. at page 14,

"It also appears that through no fault of the plaintiff, the three verdicts rendered in his favor have been set aside, and without a decision anywhere conflicting with the plaintiff's ultimate right to recover; that when the case was tried the first time it was the law that a head-end brakeman giving signals was a vice-principal; that shortly after the rendition of the first verdict the Court of
1144 Appeals reversed the Appellate Division on this subject, and held that a head-end brakeman was not a vice-principal; that this decision required the trial justice to grant a new trial, and thereafter a second trial was had and a second verdict rendered, which was appealed from and reversed as against the weight of the evidence, in accordance with the decision in Dunn v. New York Central & H. R. R. R. Co. 149 App. Div. 932, which held that an engineer under similar circumstances was guilty of contributory negligence; that the third trial was then had, and in the meantime the Dunn case was reversed by the Court of Appeals (208 N. Y. 344), and under that decision the third verdict was affirmed in the Appellate Division; and that the last verdict was reversed by the Court of Appeals and a new trial granted in an opinion sustaining the plaintiff's contention as to negligence and freedom from contributory negligence, and basing the reversal solely on an error made by the Trial Court in passing on a request to charge made by the defendant."

Subsequent to the amendment it became necessary to investigate the questions relative to Interstate Commerce. Defendant's employees being interrogated, stated that the records of the train movement in question were lost and repeated this in their sworn testimony. Many employees and ex-employees were interrogated as to the practice in the use of tracks and finally it developed from a

Michigan Central Yard Master residing in Canada, whose
1145 testimony was taken on the last two trials, that the track on which Kinney's train stood was used exclusively for interchange movements between Buffalo and Canada. On the fifth trial when testimony concerning Interstate Commerce was first offered the defendant's counsel and the court conceived the ingenious theory that if the jury found Interstate Commerce that the cause of action was outlawed in spite of the decision of the Appellate Division affirming the opinion of Justice Bissell, and therefore, no serious opposition to plaintiff's proof on that subject was made. On the last trial, however, some witnesses were sworn attempting to dispute the question of Interstate Commerce.

Deponent further alleges that this litigation has involved almost every question of law governing the relation of master and servant, both State and Federal; that it occurred when the said laws were in a transition period and while we were passing from the common law theories where the strict rules of contributory negligence and fellow-servant were applied by the courts, to these times where such defenses are modified or done away with altogether. The courts have proceeded slowly in defining these statutes. The scope of these statutes has been from time to time extended and limited by judicial decisions. Decisions which seemed to be the law have frequently been reversed and State and Federal Courts have in some instances been in conflict through this transition period. This litigation has
1146 gone on so that now as deponent believes the questions involved are settled, but there are a variety of these questions and the lack of uniformity in their solution by the court during said transition period have caused the litigation to be most difficult and extraordinary, and deponent further says that he has practiced law for 26 years in the City of Buffalo, N. Y., that a large portion of that time he has been actively engaged in the trial of actions of various sorts and in the latter years has spent most of his time in the trial of actions for personal injuries; that the extent of deponent's experience in these matters appears on the records of the court, and deponent alleges that this action has been the most difficult and extraordinary one that deponent has been charged with in his experience as a lawyer, and deponent further alleges that the plaintiff is a man without means or any capacity, and that his slender means have long since been exhausted. That the taxable costs do not begin to cover the necessary disbursement, apart from counsel fees which the plaintiff has been compelled to expend or become responsible for in the action.

That no other application has been made for an allowance and that the final judgment in the action has not been entered. That the amount of the plaintiff's claim in this action is Fifty thousand ($50,000) dollars; that the plaintiff's damages as fixed by the jury were
Forty thousand ($40,000) dollars, and the amount of the
1147 verdict, Thirty-two thousand ($32,000) dollars. That all of the issues in the action have been settled, and a motion for a new trial subsequent to the last verdict has been made and denied.

HAMILTON WARD.

Subscribed and sworn to before me this 18th day of February 1919.

HAROLD J. TILLOU,
Commissioner of Deeds in and for the City of Buffalo, N. Y.

Affidavit of Maurice C. Spratt in Opposition to Motion.

Supreme Court, Erie County.

JOHN W. KINNEY, Plaintiff,

vs.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Defendant.

STATE OF NEW YORK,
County of Erie,
City of Buffalo, ss:

Maurice C. Spratt, being duly sworn, deposes and says that
1148 he is one of the attorneys for the defendant in the above entitled action, has had general supervision of the action since its commencement and tried the same at the last trial before Honorable Herbert P. Bissell.

That this action was brought by the plaintiff, an engineer, to recover for injuries he sustained on October 12, 1908, by his engine colliding with a Michigan Central engine at Black Rock in the City of Buffalo, N. Y.

That this action is a simple negligence action in its nature, there being only two points involved:—(1) Did the dwarf light which Kinney passed show purple or green when he approached and passed it; (2) Did the brakeman at the head-end of the caboose give to Kinney a stop signal or a come-ahead signal. These were the two questions litigated, and while a large number of witnesses were sworn the case was neither difficult nor unusual and took no longer than a great many other negligence cases. There was nothing unusual or difficult about it either in the trial or in the preparation of the same; and there is nothing in this case, in deponent's opinion, which brings it within Section 3253 of the Code of Civil Procedure; that the only real questions litigated were those of the negligence of the defendant and of the contributory negligence of the plaintiff.

That the plaintiff's attorney in his motion for extra allow-
1149 ance in this matter has merely made an affidavit showing the usual and ordinary steps taken in a negligence case where it has been appealed; that the appeals were due principally to errors on the part of the plaintiff, which have necessitated appeals to be taken by the defendant, and also to an amendment to plaintiff's pleadings, which he made some eight years after the commencement action, setting up the Federal Employers' Liability Act.

Deponent further says that the procedure set forth in Mr. Ward's

affidavit does not afford any sufficient basis for an extra allowance, it being the usual and ordinary procedure taken in the trial of any negligence case where errors exist in the record. We will, therefore, only briefly reply to this affidavit.

The first trial of this action before Mr. Justice Emery, resulting in a verdict of $20,000, was set aside because of the decision in the Hallock case (197 N. Y., 450), holding that Mullen was a fellow servant with Kinney. The second verdict for $23,000 was set aside by the Appellate Division as against the weight of the evidence. The third verdict, for $12,000 was set aside by the Court of Appeals because of the court's error in refusing to charge as requested by defendant's counsel.

Mr. Ward, on page 9 of his affidavit, attempts to place upon the defendant the responsibility for the error which led to the reversal of the case the third time by the Court of Appeals. It appears from the testimnoy upon the third trial that this error was entirely due to the fault of the plaintiff's counsel and that the defendant was
1150 in nowise responsible for the same. Mr. Ward was attempting to preserve an exception in the case when he knew that the decision in the Hallock case was exactly contrary to the request he made. The court not being familiar with the decision in the Hallock case charged as requested by Mr. Ward, to which the defendant excepted. Mr. Ward then conceded that the decision in the Hallock case had decided the other way and withdrew his request, which was somewhat reluctantly granted by the court. As the case then stood the jury had been substantially charged that Mullen was a vice-principal and that for his negligence a recovery could be had. To clear this question up in the minds of the jury the defendant's counsel properly asked the court to charge the jury that if the accident was due solely to the negligence of Mullen it was the negligence of a fellow-servant. This the court refused to charge, indicating clearly that he still adhered to his former ruling upon the request made by Mr. Ward.

For the information of the court we quote the colloquy which occurred between the court and counsel upon the third trial, and which is found at pages 1127-1128 of the stenographer's minutes:

"By Mr. Ward: I think to preserve the point, I would like to ask your Honor to charge that Mullen was a vice-principal for whose carelessness or negligence the defendant was liable.
1151 By the Court: I guess under the recent decisions that is so. I so charge.

By Mr. Rourke: I except.

By Mr. Ward: That is on the Halleck case—I guess the Halleck case decided the other way.

By the Court: We will rule that way now.

By Mr. Ward: Then I will withdraw the request. I thought it was satisfactory to your Honor or I wouldn't have made the request. I withdraw the request.

By the Court: If it is satisfactory to both of you I will charge it, otherwise not. It is withdrawn.

By Mr. Rourke: I ask the court to charge the jury that if they

find the accident was due to the sole negligence of Mullen in transmitting signals it was the negligence of a fellow servant and there can be no recovery.

Refused.

Defendant excepts."

In view of the fact that the request of defendant's counsel was not only proper but was induced and made necessary by the attempt of Mr. Ward to avail himself of the exception at the expense of the court, his position that the third trial was reversed through no error of the plaintiff is hardly a fair one to take. It does not alter the situation because after he had forced the error into the record that he offered to stipulate a new trial.

Deponent further says that it was not until eight years or more after the accident that plaintiff amended his pleadings to set
1152 up interstate commerce. We submit that the proof offered by both plaintiff and the defendant as to the interstate character of the cars in question was neither involved nor extraordinary and occupied but a comparatively short part of the time consumed on the trial. That this defendant had no intimation for eight years that any claim of interstate commerce was to be made, and for that reason in the usual course of business and pursuant to the order of the Interstate Commerce Commission its records were destroyed.

That a great many of the witnesses sworn by the plaintiff were produced by the defendant at the request of Mr. Ward.

That the verdict rendered by the last jury of $32,000 is in deponent's opinion highly excessive, and if such a verdict is sustained the plaintiff has adequate means with which to compensate his attorney.

That in deponent's opinion this action was not difficult or extraordinary either as to the facts or as to the law of the case.

M. C. SPRATT.

Subscribed and sworn to before me, this 3rd day of March, 1919.

H. W. HUNTINGTON,
Notary Public, Erie Co., N. Y.

1153 *Order Settling and Filing Case.*

At a Special Term of the Supreme Court Appointed to be Held in and for the County of Erie at the City and County Hall, in the City of Buffalo, on the — Day of September, 1919.

Present: Hon. —— ——, Justice Presiding.

JOHN W. KINNEY, Plaintiff-Respondent,

vs.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Defendant-Appellant.

It appearing that the parties to the above entitled action have duly stipulated the within record on appeal, and

It further appearing that Hon. Herbert P. Bissell, now deceased, was the Justice before whom this case was tried,

It is hereby ordered that the foregoing case, containing all the evidence taken and proceedings had upon the trial of this action, be, and the same hereby is settled as above set forth and ordered filed in Erie County Clerk's office.

____ ____,
Justice of Supreme Court.

1154 *Stipulation.*

It is hereby stipulated that the foregoing case and exceptions contains all the evidence taken and proceedings had upon the trial of this action, and may be settled, signed and ordered filed by the Justice sitting in Special Term; and that the same shall stand for all purposes as the original case herein.

It is further stipulated that the foregoing notices of appeal, judgment roll, case and exceptions, order denying motion for new trial, notice of motion for order granting additional allowance, affidavits used in support of and in opposition to said motion, order granting additional allowance are true and correct copies of and from the originals thereof entered and remaining on file in Erie County Clerk's office and certification of the same is hereby waived.

It is further stipulated that any and all exhibits received in evidence on the trial of this action may be handed up and used by the court on the argument of this appeal with the same force and effect as if set forth in full in this record.

Dated Buffalo, N. Y., September 5, 1919.

HAMILTON WARD,
Attorney for Plaintiff-Respondent.
HOYT & SPRATT,
Attorneys for Defendant-Appellant.

1155 *Affidavit of No Opinion.*

STATE OF NEW YORK,
County of Erie, ss:

Herbert W. Huntington, being duly sworn says that he is an attorney associated with Hoyt & Spratt attorneys for the appellant herein; that no opinion was written by the Justice who denied the motion for new trial upon the decision of said motion as deponent is informed and verily believes.

HERBERT W. HUNTINGTON.

Sworn to before me this 5th day of September, 1919.

PERCY R. SMITH,
Notary Public, Erie County.

1156 *Remittitur.*

At a Term of the Appellate Division of the Supreme Court of the State of New York in and for the Fourth Judicial Department, at the City of Rochester, N. Y., Commencing on the 6th Day of January, 1920.

Present:

Hon. Frederick W. Kruse,
Justice Presiding.
" John S. Lambert,
" Pascal C. J. De Angelis,
" Irving G. Hubbs,
" William W. Clark,
Associate Justices.

JOHN W. KINNEY, Respondent,

VS.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Appellant.

The New York Central & Hudson River Railroad Company, defendant in this action, having appealed to the Appellate Division of the Supreme Court, Fourth Department from a judgment of the Supreme Court, entered in the office of the Clerk of the County of Erie on the 19th day of April, 1919, and from an order denying defendant's motion for a new trial entered in said Clerk's office on the 3d day of February, 1919, and from an order entered in said Clerk's office on the 4th day of April, 1919, granting an additional allowance of costs to plaintiff, and said appeal having been
1157 argued by Maurice C. Spratt, Esq., of counsel for appellant, and Hamilton Ward, Esq., of counsel for respondent, and due deliberation having been had thereon, it is hereby

Ordered, that the judgment and order denying defendant's motion for a new trial on the minutes of the court, be and the same hereby are affirmed, with costs. And it is

Further ordered, that the order granting an additional allowance of costs be and the same hereby is reversed, with ten dollars costs.

All concur.

FREDERICK W. KRUSE.

Enter

[SEAL.] NEWELL C. FULTON,
Clerk.

Dated, January 21, 1920.

SIRS:

Please take notice that an order of which the within is a true copy was this day entered in the within entitled action in the office of the Clerk of Erie County, at Buffalo, N. Y.

Dated, Buffalo, N. Y., February 4th, 1920.

Yours, etc.

HAMILTON WARD,
Attorney for Respondent.

Office and Post Office Address, Rooms 104–109 Erie Co. Sav. Bk. Bldg., Buffalo, N. Y.

To Hoyt & Spratt, Attorneys for Appellant.

1158 *Judgment of Affirmance.*

Supreme Court, Erie County.

JOHN W. KINNEY, Respondent,

VS.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Appellant.

The appeal taken by the defendant from a judgment entered in the office of the Clerk of the County of Erie on the 19th day of April, 1919, having been brought on for a hearing, and heard at the Appellate Division, Supreme Court, Fourth Department, at the City of Rochester, N. Y., at a term of said court commencing on the 6th day of January, 1920, and an order of said Appellate Division having been thereafter and on the 21st day of January, 1920, made and entered, affirming said judgment, with costs of said appeal to the respondent, and all of the judges concurring therein.

Now, on motion of Hamilton Ward, attorney for respondent, it is hereby

Adjudged, that the said judgment be, and the same is hereby in all respects affirmed, and that the respondent recover of the appellant the sum of one hundred eight and 88/100 dollars ($108.88) costs and disbursements, and that he have execution against defendant therefor.

Judgment signed this 4th day of February, 1920.

EDW. J. CLARK,
1159 *Sp. Dep. Clerk.*

SIRS:

Please take notice that an order of which the within is a true copy was this day entered in the within entitled action in the office of the Clerk of Erie County, at Buffalo, N. Y.

Dated, Buffalo, N. Y., February 4th, 1920.

Yours, etc.

HAMILTON WARD,
Attorney for Respondent.

Office and Post Office Address, Rooms 104–109 Erie Co. Sav. Bk. Bldg., Buffalo, N. Y.

To Hoyt & Spratt, Attorneys for Appellant.

1160 *Notice of Appeal to Court of Appeals.*

STATE OF NEW YORK:

Supreme Court, Appellate Division, Fourth Department.

JOHN W. KINNEY, Respondent,

against

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Appellant.

SIRS:

Please take notice, that pursuant to the leave granted by the Appellate Division of the Supreme Court, Fourth Department, in an order entered in the office of the Clerk of the said Appellate Division on the 17th day of March, 1920, and in the office of the Clerk of Erie County on the 22nd day of March, 1920, the above named defendant, the New York Central & Hudson River Railroad Company, hereby appeals to the Court of Appeals from the judgment of the Appellate Division of the Supreme Court, Fourth Department, entered herein in the office of the Clerk of the County of Erie on the 4th day of February, 1920, which said judgment affirmed with $108.88 costs the judgment of the Supreme Court, Erie County in favor of the above named plaintiff and against the above named defendant, entered in the office of the Clerk of the County
1161 of Erie on the 19th day of April, 1919, for the sum of $32,000.00 damages and $3,858.99 costs, and the defendant appeals from each and every part of said judgment.

Dated, Buffalo, New York, March 22nd, 1920.

HOYT & SPRATT,
Attorneys for Defendant-Appellant.

Office and P. O. Address, 810–826 Fidelity Bldg., Buffalo, New York.

To Hamilton Ward, Attorney for Plaintiff, and —— ——, Clerk of Erie County.

1162 *Order Allowing Appeal to Court of Appeals.*

At a Term of the Appellate Division of the Supreme Court of the State of New York in and for the Fourth Judicial Department, at the City of Rochester, N. Y., Commencing on the 2nd Day of March, 1920.

Present:

Hon. Frederick W. Kruse,
Presiding Justice.
" John S. Lambert,
" Pascal C. J. DeAngelis,
" Irving G. Hubbs,
" William W. Clark,
Associate Justices.

JOHN W. KINNEY, Respondent,

vs.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Appellant.

The above named The New York Central & Hudson River Railroad Company, appellant herein, on the 2nd day of March, 1920, duly moved before this court for an order granting to it a reargument of the appeal herein, or in the event that such motion for a reargument should be denied, for an order granting to it leave to appeal to the Court of Appeals from the judgment
1163 of affirmance entered upon the order of affirmance heretofore and on the 21st day of January, 1920, duly made and entered herein by this court.

Now, after reading and filing the affidavit of Maurice C. Spratt, verified the 20th day of February, 1920, the notice of said motion, together with proof of due service thereof upon counsel for the opposing party, and upon all the proceedings heretofore had and taken herein, after hearing Mr. Maurice C. Spratt of counsel for appellant, in favor of said motion, and Mr. Hamilton Ward. of counsel for respondent, in opposition, thereto, and due deliberation having been had thereon,

It is hereby ordered, that the said motion for a reargument be, and the same hereby is, denied, and that the said motion for leave to appeal to the Court of Appeals be, and the same hereby is, granted, and this court does hereby certify that in its opinion a question of law is involved herein which ought to be reviewed by the Court of Appeals.

Entered 17th day of March, 1920.

NEWELL C. FULTON.

Enter:
FREDERIC W. KRUSE.

1164 Supreme Court, Appellate Division, Fourth Judicial Department.

I, Newell C. Fulton, clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that the within is a true copy of the original order, now on file in this office, and of the whole thereof.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at the City of Rochester, New York, this 17th day of March, 1920.

[SEAL.] NEWELL C. FULTON,
Clerk.

Stipulation.

STATE OF NEW YORK:

Court of Appeals.

JOHN W. KINNEY, Respondent,

vs.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO., Appellant.

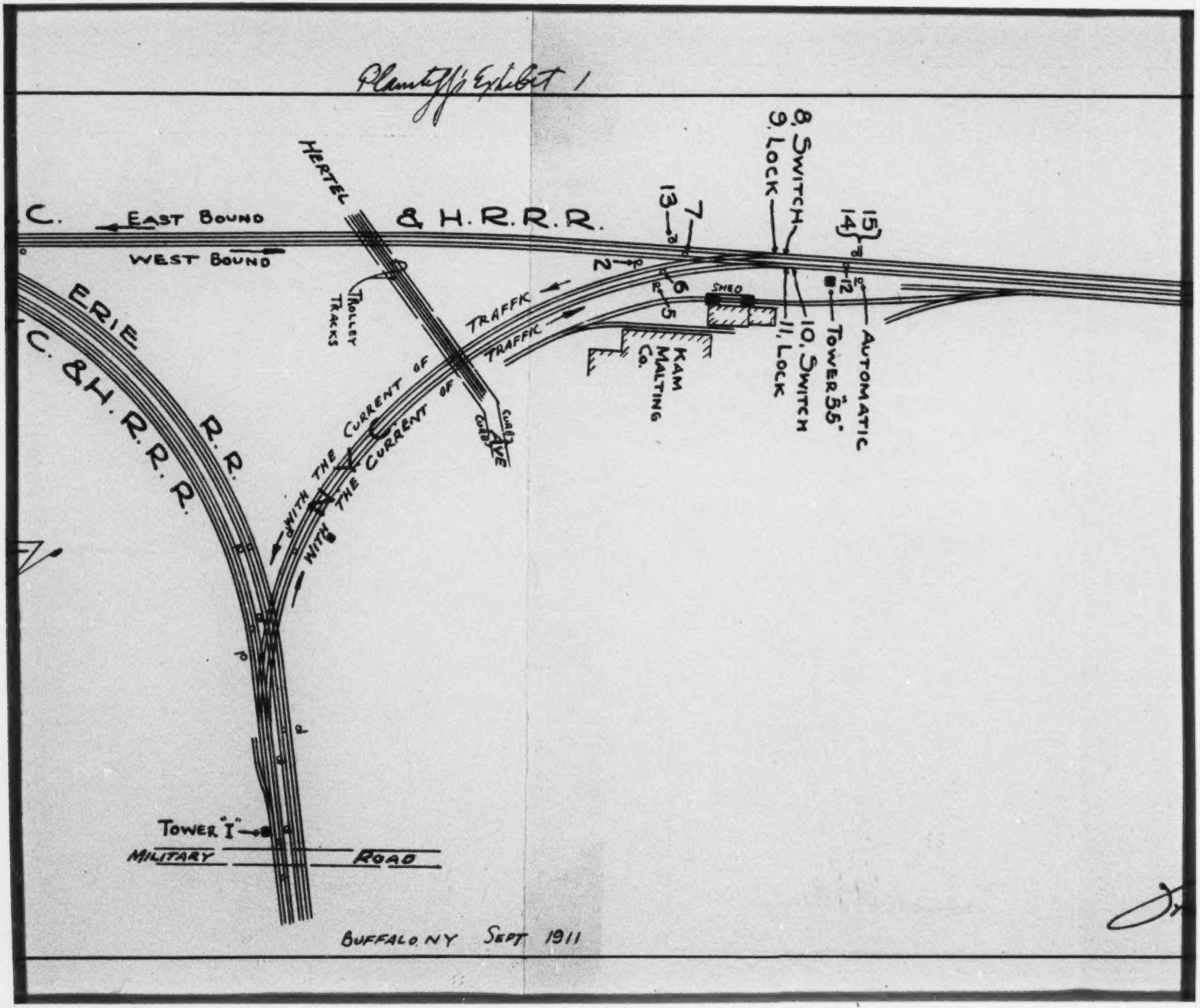
1165 It is hereby stipulated, by and between the attorneys for the respective parties to the above entitled action that the foregoing copies of the remittitur, judgment, order allowing appeal and notice of appeal to the Court of Appeals and all other papers and documents in said case contained are true and correct transcripts of and from the originals now on file in the office of the Clerk of the County of Erie and the office of the Clerk of the Appellate Division, Fourth Department, and that the same may stand upon this appeal with the same force and effect as if certified by the Clerk of said county or of the said Appellate Division, and

It is further stipulated, that any and all the plaintiff's and defendant's exhibits, whether printed in the record or made a part hereof or not, may be produced and used upon the argument of this appeal with the same force and effect as if fully printed and set forth in the printed record on appeal.

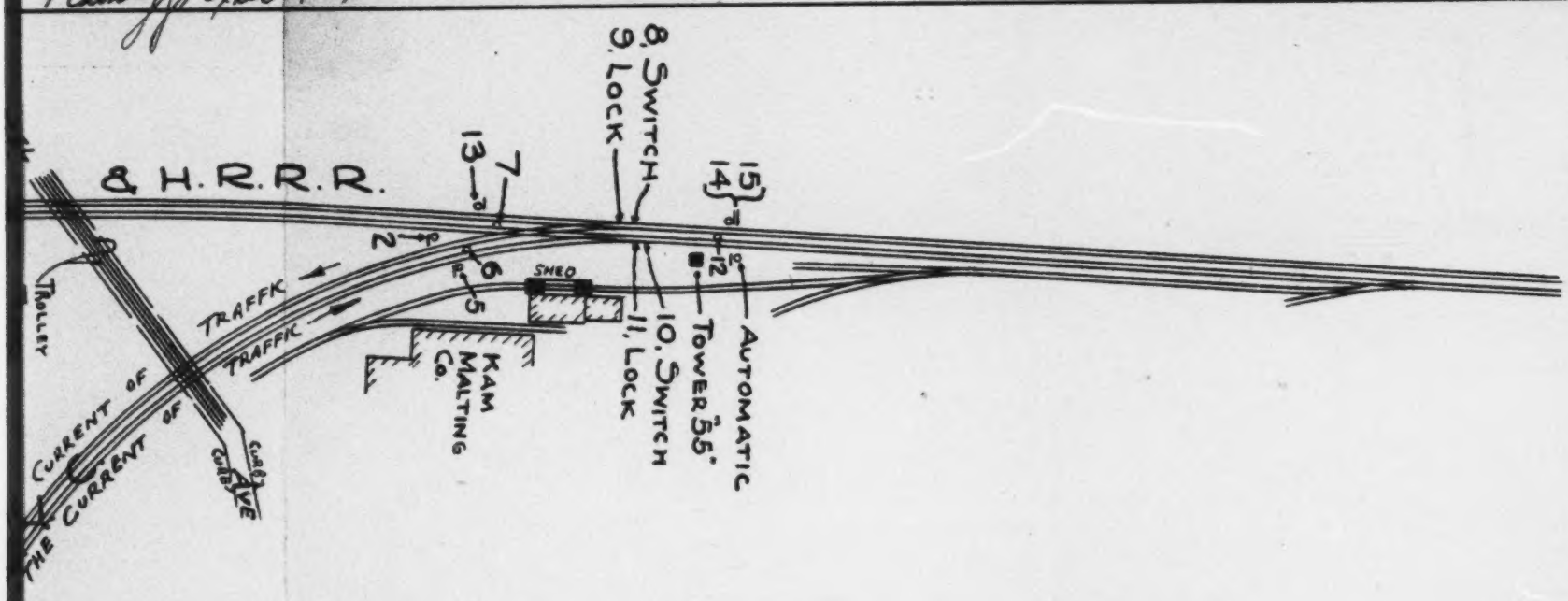
Dated, Buffalo, N. Y. April 15, 1920.

HAMILTON WARD,
Attorney for Respondent.
HOYT & SPRATT,
Attorneys for Appellant.

7465 180/LL A


Plaintiff's Exhibit 1
C.
EAST BOUND
WEST BOUND
& H.R.R.R.
HERTEL
TROLLEY TRACKS
ERIE
C. & H. R.R.R.
R.R.
TRAFFIC
TRAFFIC
WITH THE CURRENT OF
WITH THE CURRENT OF
CURTIS AVE
7
13
2
6
5
SHED
8. SWITCH
9. LOCK
15
14
12
AUTOMATIC
10. SWITCH
11. LOCK
TOWER "55"
KAM MALTING Co.
TOWER "I"
MILITARY ROAD
BUFFALO NY SEPT 1911

Plaintiff's Exhibit 1



Buffalo, NY Sept 1911

Frederick K. Wing.
Civil Engineer

PLAINTIFF'S EXHIBIT 2

87



Stop—Swung across the track.

See Rule 13 (a).

Proceed—Raised and lowered vertically.

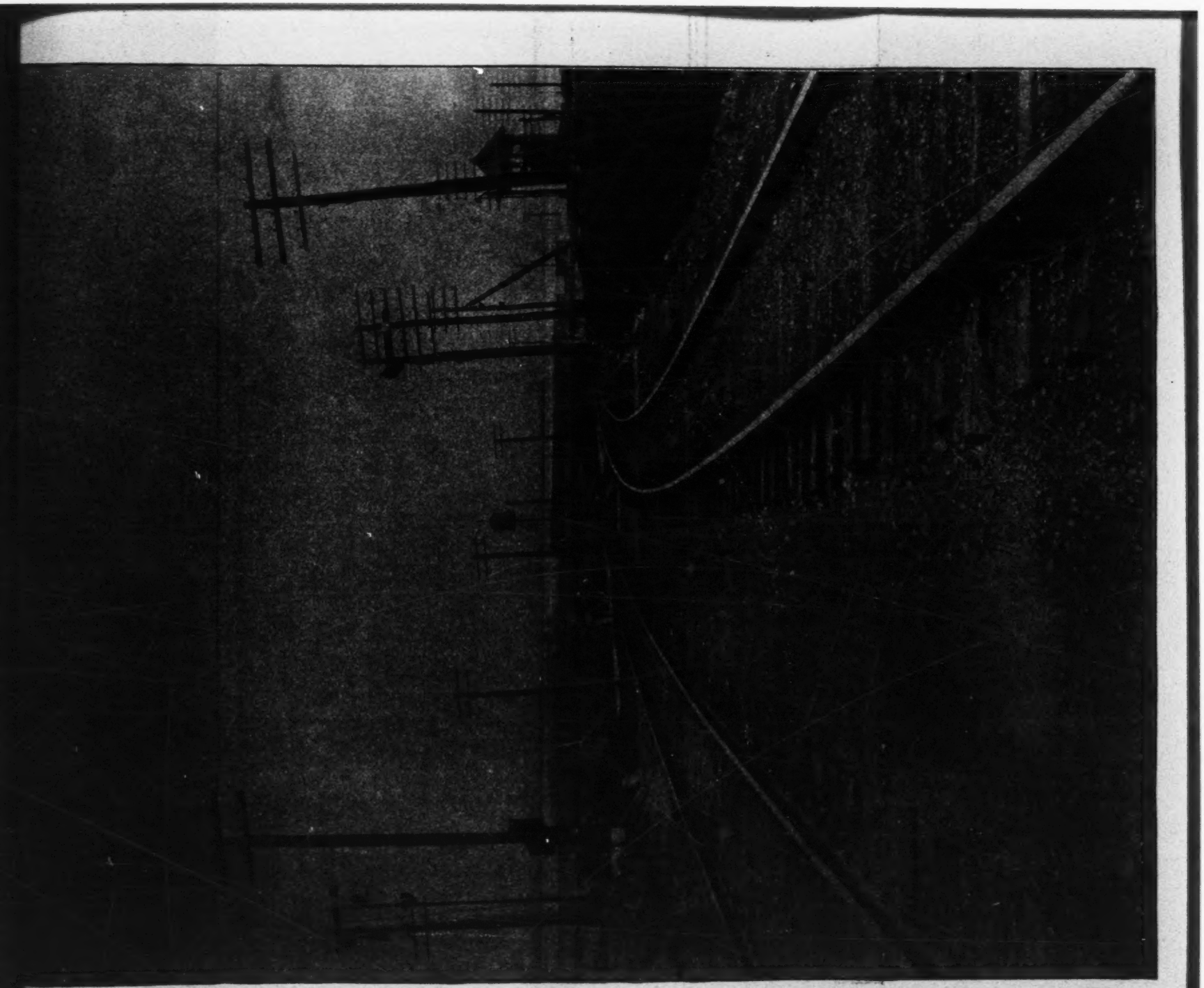
See Rule 13 (b).





Back—Swung vertically in a circle at half-arm's length across the track.

See Rules 13 (c) and 14 (A).



PLAINTIFF'S EXHIBIT 4



1170

1171

1172

FORM M. P. 3004. **New York Central & Hudson River Railroad Co.** U.S.A. 8-10-05. 10000.

MOTIVE POWER DEPARTMENT.

REPORT OF CONDITION OF ENGINE AT END OF TRIP.

Report of condition of engine No. 2499 *after careful inspection on arrival at* Depew *A. M.* 10-1 *190* 8

Eng'ne is in good condition, with the exception of the items marked X *in column headed "Eng'r" and items reported under heading "other defects."*

No.	Name of Part	Location	Eng'r	Insp.	Repairs made by
	HOT BEARINGS.				
1	Journals				
2	Pins				
	AIR BRAKE EQUIPMENT.				
3	Air Brake Equipment				
4	" Pump		(X)		Donnelly
5	" Signal Equipment		(X)		
6	Brake Beams & Shoes				
7	Driver Brakes Rec			X	Burns
	BOILER				
8	Blow off Cocks				
9	Brick Arch				
10	" " Tubes Leaking				
11	Check				
12	Ch'n in Cab Defective or Leak'g				
13	Crown Sheet Leaking		X		
14	Exhaust Pipes "				
15	Firebox "				
16	" Doors "				
17	Flues south		(X)		
18	" Stopped		(X)		
19	Foaming				
20	Front End Arrangement				
21	Gage Cocks				
22	Grates				
23	Grate Shaker Rigging				
24	Injectors and Pipes				
25	Mud Ring Leaking				
26	Safety Valve				
27	Side Sheets Leaking				
28	Stay Bolts "				
29	Steam Pipes "		X		B. Hennessey
30	Throat Sheet "				
31	Throttle "				
32	" Packing "				
33	" Lever				
34	Water Glass & Cocks				
35	Whistle & Rigging				
	MACHINERY.				
36	Bolts Loose in Crosshead				
37	" " " R'k'r boxes				
38	Crank Pin Loose				
39	" " Collars				
40	Crosshead Key & Pin				
41	Cylinder Leaking				
42	" Cocks & Rigging				
43	" Head Leaking				
44	" Packing Blowing				
45	Driving Boxes				
46	Eccentrics				
47	" Straps & Bolts				
48	Frame Broken				
49	" Bolts " or Loose				
50	" Splices Working				
51	Guides Loose				
52	" Lost Motion				

No.	Name of Part	Location	Eng'r	Insp.	Repairs made by
	MACHINERY—CON.				
53	Knuckle Joint Pins				
54	Lost Motion in Link Motion				
55	Main Rods				
56	Pack Journals				
57	Piston Head Loose				
58	" Rod "				
59	" " Broken				
60	" " Packing				
61	Pounds in Boxes				
62	" in Wedges				
63	Relief Valves				
64	Reverse Lever				
65	Rocker Boxes				
66	Rod Bushings Eq on N.L.R.R.			(X)	Porski
67	Steam Chest				
68	" Gage				
69	Strap Bolts				
70	Transmission Bar & Pin		(X)		
71	Valves Blowing		(X)		
72	" out of Square				
73	Valve Rod Packing				
74	Wedges Set up				
	MISCELLANEOUS.				
75	Ash Pan				
76	Bell Ringer		X		Donnelly
77	Blower Pipe & Valves				
78	Cab Repairs				
79	Cellar Bolts				
80	Coupler Defective				
81	Headlight				
82	Lost Motion—Engine & Tender				
83	Lubricator				
84	Marker Lamps		X		
85	Oil & Grease Cups Fill or Supply				
86	" " " Plugs				
87	" Pipes				
88	Pedestal Bolts				
89	Pilot				
90	Sander & Sand Pipes Rear end		(X)		Morey
91	Sharp Flanges on Tires				
92	Springs—Buffer				
93	" Driver				
94	" Engine Truck				
95	" Tender & Trailer				
96	" Eq'liz'rs & Hangers				
97	Steam Heat Gage		(X)		
98	" " Hose & Pipes		(X)		
99	" " Regulators				
100	" " Valves				
101	Tank Hose				
102	" Leaks				
103	" Valves				
104	Tender Truck Brasses				
105	Tires Loose				
106	Water Scoop				

Saftey valve lifts at 200 *lbs. Safety valve sets at* 195 *lbs. Reservoir pressure* 110 *lbs. Train line pressure* 80 *lbs.*

OTHER DEFECTS: Eng. Does not steam. Repair jacket under boiler

L. Nap 3. Yard 1173

Plaintiff's Exhibit 7

N. Lee Care flat

Yard

Engineer

Enginemen must carefully inspect their locomotives before turned over to engine house force, on the end of each day's work. Enginemen will be held responsible for reporting on this form all defects which can be seen by them from the outside, or observed on the road. Enginemen must make report on one of these forms whether the engine requires repairs or not, and must always fill in items "Safety Valve lifts at....." "Safety Valve sets at....." "Reservoir Pressure....." and "Train Line Pressure....." No attention will be paid to verbal reports or reports not signed by enginemen.

Items numbers 6, 13, 24, 34, 35, 40, 42, 47, 70, 77, 90, 95, 96 and 98 contain two or three items each; when reporting any of the items for any of these numbers for repairs, draw a line through the item which is in good condition and which is NOT in need of repairs.

The Engineman, to report an item in need of repairs, should place an X after the item in column headed "Eng'r," and the Inspector, to report an item in need of repairs, should place an X after the item in column headed "Insp.," thus:

No.	Name of Part	Location	Eng'r	Insp.	Repairs made by
1	Hot journal	R. M. D.	X		
93	Springs—Driving	L. F.		X	

would indicate that the Engineman had reported the right main driving journal as running hot and that the Inspector had reported the left forward driving spring in need of repairs.

When repairs have been made the Foreman or the man in charge of the work must draw a circle around the X which indicates that the repairs have been made, thus:

No.	Name of Part	Location	Eng'r	Insp.	Repairs made by
1	Hot journal	R. M. D.	⊗		John Smith
93	Springs—Driving	L. F.		⊗	W. Jones

would indicate that the hot driving journal reported by the Engineman had been repaired by John Smith, and the left forward driving spring reported by the Inspector had been repaired by W. Jones.

The following items reported under the heading "Other Defects" have been repaired:

ITEM REPORTED	REPAIRS MADE BY
Boiler Washed	Bartel
Tocho + Nitrogen packed	Popplet
Gauge cocks ground	" "
Gauge tested	" "
Tank cleaned	Burnett
Wheels doped	Burdock

When items are reported as in need of repairs and the repairs are not made, the Foreman or the the man in charge of the work must give the reasons for not making the repairs in column headed "Repairs Made By."

Reservoir Pressure 100 lbs. } as found. Reservoir Pressure 100 lbs. } as corrected.
Train Line Pressure 70 lbs. } Train Line Pressure 70 lbs. }

Repaired at G. J.

Repairs completed 10-3 1903 at 5 P. M.

Repairs made by Bartel Popplet, Burnett & Burdock
Name of workman in charge of work.

Inspected by Gortell.
Engine Inspector.

Air Brakes Inspected by _____
Air Brake Inspector.

Approved by Gilbert,
Engine House Foreman.

NOTE:—The workman in charge of the work, Engine Inspector and Air Brake Inspector will sign this report and hand it to the Engine House Foreman, who will approve same and forward to the Master Mechanic, or the Division Superintendent of Motive Power.

New York Central & Hudson River Railroad Co.

MOTIVE POWER DEPARTMENT.

REPORT OF CONDITION OF ENGINE AT END OF TRIP.

Report of condition of engine No. 2499 *after careful inspection on arrival*

at G. Rock 8:45 A.M. Oct 4 *190* 8

Engine is in good condition, with the exception of the items marked X *in column headed "Eng'r" and items reported under heading "other defects."*

No.	Name of Part	Location	Eng'r	Insp.	Repairs made by
	HOT BEARINGS.				
1	Journals				
2	Pins				
	AIR BRAKE EQUIPMENT.				
3	Air Brake Equipment				
4	" Pump				
5	" Signal Equipment				
6	Brake Beams & Shoes				
7	Driver Brakes Rods	R.F.	X		Lakey
	BOILER				
8	Blow off Cocks				
9	Brick Arch				
10	" " Tubes Leaking				
11	Check guard on	R.F.	O		J. Nast
12	Ck's in Cab Defective or Leak'g				
13	Crown Sheet Leaking	X	O		Rudy
14	Exhaust Pipes "				
15	Firebox "				
16	" Doors "				
17	Flues "		O		Rudy
18	" Stopped		O		swartz
19	Foaming				
20	Front End Arrangement				
21	Gage Cocks				
22	Grates				
23	Grate Shaker Rigging				
24	Injectors and Pipes				
25	Mud Ring Leaking				
26	Safety Valve				
27	Side Sheets Leaking	L.S.			
28	Stay Bolts " outside of Cab		O		Rudy
29	Steam Pipes " Blower &		O		Lakey
30	Throat Sheet "				
31	Throttle "				
32	" Packing "				
33	" Lever				
34	Water Glass & Cocks				
35	Whistle & Rigging				
	MACHINERY.				
36	Bolts Loose in Crosshead				
37	" " " R'k'r boxes				
38	Crank Pin Loose				
39	" " Collars				
40	Crosshead Key & Pin				
41	Cylinder Leaking				
42	" Cocks & Rigging	R.F.	O		Lakey
43	" Head Leaking				
44	" Packing Blowing				
45	Driving Boxes				
46	Eccentrics				
47	" Straps & Bolts				
48	Frame Broken				
49	" Bolts " or Loose				
50	" Splices Working				
51	Guides Loose				
52	" Lost Motion				

No.	Name of Part	Location	Eng'r	Insp.	Repairs made by
	MACHINERY—CON.				
53	Knuckle Joint Pins				
54	Lost Motion in Link Motion				
55	Main Rods Reduce	O.S	X		Lakey
56	Pack Journals				
57	Piston Head Loose				
58	" Rod "				
59	" " Broken				
60	" " Packing				
61	Pounds in Boxes				
62	" in Wedges				
63	Relief Valves				
64	Reverse Lever				
65	Rocker Boxes				
66	Rod Bushings	L.D.	O		Lakey
67	Steam Chest				
68	" Gage				
69	Strap Bolts				
70	Transmission Bar & Pin				
71	Valves Blowing both valves		X		Lakey
72	" out of Square		X		Lakey
73	Valve Rod Packing				
74	Wedges Set up				
	MISCELLANEOUS.				
75	Ash Pan				
76	Bell Ringer				
77	Blower Pipe & Valves				
78	Cab Repairs				
79	Cellar Bolts				
80	Coupler Defective				
81	Headlight				
82	Lost Motion—Engine & Tender				
83	Lubricator				
84	Marker Lamps				
85	Oil & Grease Cups Fill or Apply	L.D.	X		Meyer
86	" " " Plugs				
87	" Pipes to Steam Gage	L.D.	X		Dunkey
88	Pedestal Bolts				
89	Pilot				
90	Sander & Sand Pipes				
91	Sharp Flanges on Tires				
92	Springs—Buffer				
93	" Driver				
94	" Engine Truck				
95	" Tender & Trailer				
96	" Eq'liz'rs & Hangers				
97	Steam Heat Gage				
98	" " Hose & Pipes				
99	" " Regulators				
100	" " Valves				
101	Tank Hose				
102	" Leaks				
103	" Valves				
104	Tender Truck Brasses				
105	Tires Loose				
106	Water Scoop				

Saftey valve lifts at 200 *lbs. Safety valve sets at* 195 *lbs. Reservoir pressure* 120 *lbs. Train line pressure* 70 *lbs.*

OTHER DEFECTS: Gaulk leak under belly of boiler smoke box leaks air

Plaintiffs exhibit 8

1174

H. Ames

Engineer

Enginemen must carefully inspect their locomotives before turned over to engine house force, on the end of each day's work. Enginemen will be held responsible for reporting on this form all defects which can be seen by them from the outside, or observed on the road. Enginemen must make report on one of these forms whether the engine requires repairs or not, and must always fill in items "Safety Valve lifts at....," "Safety Valve sets at....," "Reservoir Pressure....." and "Train Line Pressure....." No attention will be paid to verbal reports or reports not signed by enginemer

Items numbers 6, 13, 24, 34, 35, 40, 42, 47, 70, 77, 90, 95, 96 and 98 contain two or three items each; when reporting any of the items for any of these numbers for repairs, draw a line through the item which is in good condition and which is NOT in need of repairs.

The Engineman, to report an item in need of repairs, should place an X after the item in column headed "Eng'r," and the Inspector, to report an item in need of repairs, should place an X after the item in column headed "Insp.," thus:

No.	Name of Part	Location	Eng'r	Insp.	Repairs made by
1	Hot journal	R. M. D.	X		
93	Springs—Driving	L. F.		X	

would indicate that the Engineman had reported the right main driving journal as running hot and that the Inspector had reported the left forward driving spring in need of repairs.

When repairs have been made the Foreman or the man in charge of the work must draw a circle around the X which indicates that the repairs have been made, thus:

No.	Name of Part	Location	Eng'r	Insp.	Repairs made by
1	Hot journal	R. M. D.	⊗		John Smith
93	Springs—Driving	L. F.		⊗	W. Jones

would indicate that the hot driving journal reported by the Engineman had been repaired by John Smith, and the left forward driving spring reported by the Inspector had been repaired by W. Jones.

The following items reported under the heading "Other Defects" have been repaired:

ITEM REPORTED	REPAIRS MADE BY

When items are reported as in need of repairs and the repairs are not made, the Foreman or the the man in charge of the work must give the reasons for not making the repairs in column headed "Repairs Made By."

Reservoir Pressure ____ lbs } as found. Reservoir Pressure ____ lbs. } as corrected.
Train Line Pressure ____ lbs. } Train Line Pressure ____ lbs. }

Repaired at E Buffalo.

Repairs completed 10—6 190 8 at 4 P. M.

Repairs made by E. Smythe
Name of workman in charge of work.

Inspected by Hansbee
Engine Inspector.

Air Brakes Inspected by Shuttles
Air Brake Inspector.

Approved by J. J. C.
Engine House Foreman.

NOTE:—The workman in charge of the work, Engine Inspector and Air Brake Inspector will sign this report and hand it to the Engine House Foreman, who will approve same and forward to the Master Mechanic, or the Division Superintendent of Motive Power.

New York Central & Hudson River Railroad Co.

MOTIVE POWER DEPARTMENT.

REPORT OF CONDITION OF ENGINE AT END OF TRIP.

Report of condition of engine No. 2799 *after careful inspection on arrival at* E. Buffalo 9¼ P.M. 10—5 *190*7

Eng'ne is in good condition, with the exception of the items marked X *in column headed "Eng'r" and items reported under heading "other defects."*

No.	Name of Part	Location	Eng'r	Insp.	Repairs made by
	HOT BEARINGS.				
1	Journals				
2	Pins				
	AIR BRAKE EQUIPMENT.				
3	Air Brake Equipment				
4	" Pump				
5	" Signal Equipment				
6	Brake Beams & Shoes				
7	Driver Brakes				
	BOILER				
8	Blow off Cocks				
9	Brick Arch				
10	" " Tubes Leaking				
11	Check Back Sides		X		J Nash
12	Cks in Cab Defective or Leak'g				
13	Crown Sheet Leaking		X		Roesh
14	Exhaust Pipes "				
15	Firebox "				
16	" Doors "				
17	Flues "		X		Roesh
18	" Stopped		X		Swart
19	Foaming				
20	Front End Arrangement				
21	Gage Cocks				
22	Grates				
23	Grate Shaker Rigging				
24	Injectors ~~and Pipes~~		X		J Nash
25	Mud Ring Leaking				
26	Safety Valve				
27	Side Sheets Leaking				
28	Stay Bolts "				
29	Steam Pipes "				
30	Throat Sheet "				
31	Throttle "				
32	" Packing "				
33	" Lever				
34	Water Glass & Cocks				
35	Whistle & Rigging				
	MACHINERY.				
36	Bolts Loose in Crosshead				
37	" " " R'k'r boxes				
38	Crank Pin Loose				
39	" " Collars				
40	Crosshead Key & Pin				
41	Cylinder Leaking				
42	" Cocks & Rigging				
43	" Head Leaking				
44	" Packing Blowing				
45	Driving Boxes				
46	Eccentrics				
47	" Straps & Bolts				
48	Frame Broken				
49	" Bolts " or Loose				
50	" Splices Working				
51	Guides Loose				
52	" Lost Motion				

No.	Name of Part	Location	Eng'r	Insp.	Repairs made by
	MACHINERY—CON.				
53	Knuckle Joint Pins				
54	Lost Motion in Link Motion				
55	Main Rods				
56	Pack Journals				
57	Piston Head Loose				
58	" Rod "				
59	" " Broken				
60	" " Pucking				
61	Pounds in Boxes				
62	" in Wedges				
63	Relief Valves				
64	Reverse Lever				
65	Rocker Boxes				
66	Rod Bushings				
67	Steam Chest				
68	" Gage				
69	Strap Bolts				
70	Transmission Bar & Pin				
71	Valves Blowing				
72	" out of Square				
73	Valve Rod Packing				
74	Wedges Set up				
	MISCELLANEOUS.				
75	Ash Pan				
76	Bell Ringer				
77	Blower Pipe & Valves				
78	Cab Repairs				
79	Cellar Bolts				
80	Coupler Defective				
81	Headlight				
82	Lost Motion—Engine & Tender				
83	Lubricator				
84	Marker Lamps				
85	Oil & Grease Cups Fill or Apply				
86	" " " Plugs				
87	" Pipes				
88	Pedestal Bolts				
89	Pilot				
90	Sander & Sand Pipes				
91	Sharp Flanges on Tires				
92	Springs—Buffer				
93	" Driver				
94	" Engine Truck				
95	" Tender & Trailer				
96	" Eq'liz'rs & Hangers				
97	Steam Heat Gage				
98	" " Hose & Pipes				
99	" " Regulators				
100	" " Valves				
101	Tank Hose	F.S.	X		Bender
102	" Leaks				
103	" Valves				
104	Tender Truck Brasses				
105	Tires Loose				
106	Water Scoop				

Safety valve lifts at 200 *lbs. Safety valve sets at* 199 *lbs. Reservoir pressure* 100 *lbs. Train line pressure* 90 *lbs.*

OTHER DEFECTS:

Plaintiff's Exhibit 9

1175

C. Cook

Engineer

Enginemen must carefully inspect their locomotives before turned over to engine house force, on the end of each day's work. Enginemen will be held responsible for reporting on this form all defects which can be seen by them from the outside, or observed on the road. Enginemen must make report on one of these forms whether the engine requires repairs or not, and must always fill in items "Safety Valve lifts at....," "Safety Valve sets at....," "Reservoir Pressure....." and "Train Line Pressure....." No attention will be paid to verbal reports or reports not signed by enginemen.

Items numbers 6, 13, 24, 34, 35, 40, 42, 47, 70, 77, 90, 95, 96 and 98 contain two or three items each; when reporting any of the items for any of these numbers for repairs, draw a line through the item which is in good condition and which is NOT in need of repairs.

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1	Hot journal	R. M. D.	X		
93	Springs—Driving	L. F.		X	

would indicate that the Engineman had reported the right main driving journal as running hot and that the Inspector had reported the left forward driving spring in need of repairs.

When repairs have been made the Foreman or the man in charge of the work must draw a circle around the X which indicates that the repairs have been made, thus:

No.	Name of Part	Location	Eng'r	Insp.	Repairs made by
1	Hot journal	R. M. D.	⊗		John Smith
93	Springs—Driving	L. F.		⊗	W. Jones

would indicate that the hot driving journal reported by the Engineman had been repaired by John Smith, and the left forward driving spring reported by the Inspector had been repaired by W. Jones.

The following items reported under the heading "Other Defects" have been repaired:

ITEM REPORTED	REPAIRS MADE BY

When items are reported as in need of repairs and the repairs are not made, the Foreman or the the man in charge of the work must give the reasons for not making the repairs in column headed "Repairs Made By."

Reservoir Pressure ____ lbs } as found. Reservoir Pressure ____ lbs. } as corrected.
Train Line Pressure ____ lbs. } Train Line Pressure ____ lbs. }

Repaired at E. Buffalo

Repairs completed 10 — 6 1907 at 3 P. M.

Repairs made by E Smythe
Name of workman in charge of work.

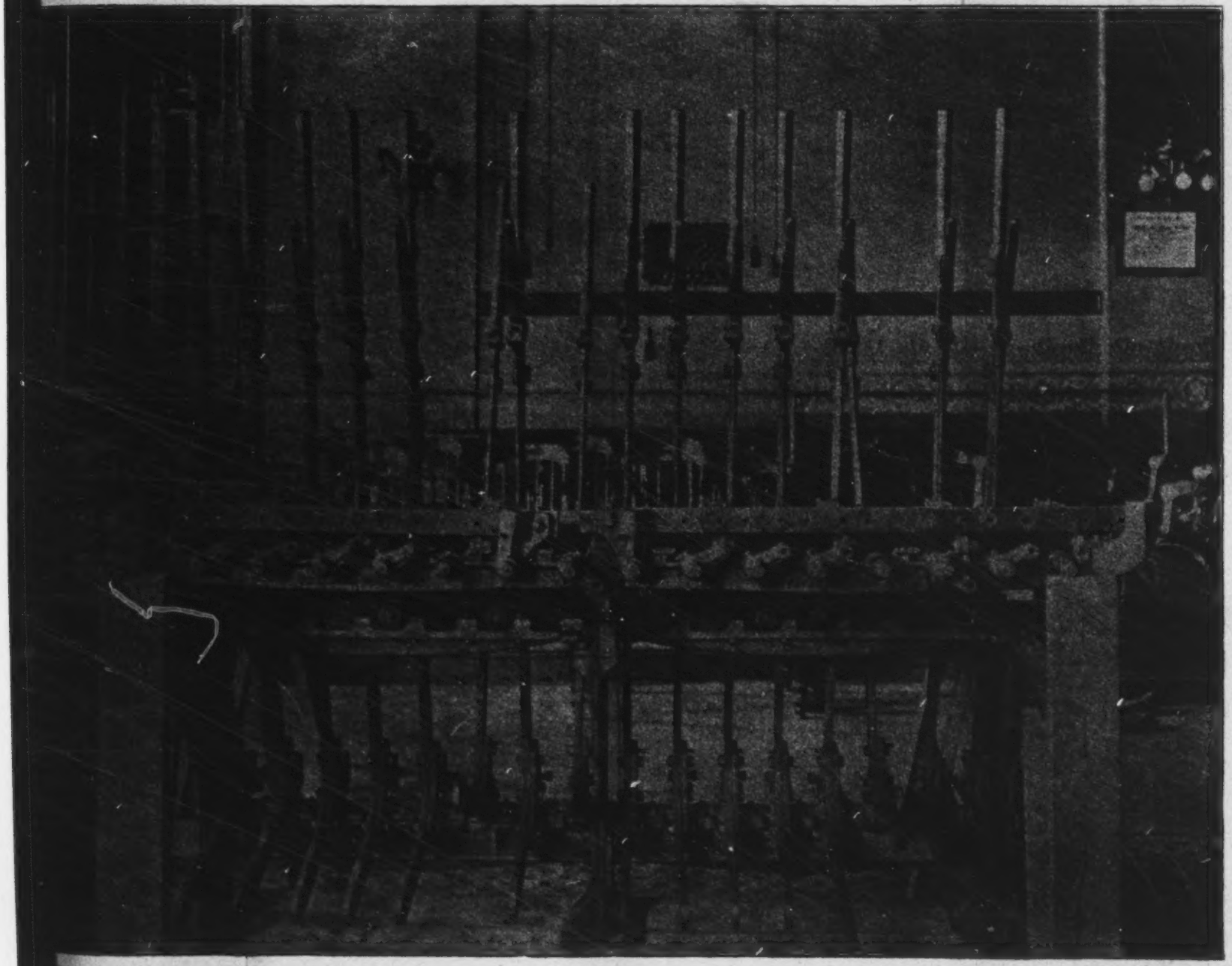
Inspected by Hanbyler
Engine Inspector.

Air Brakes Inspected by Shuttler
Air Brake Inspector.

Approved by J C
Engine House Foreman.

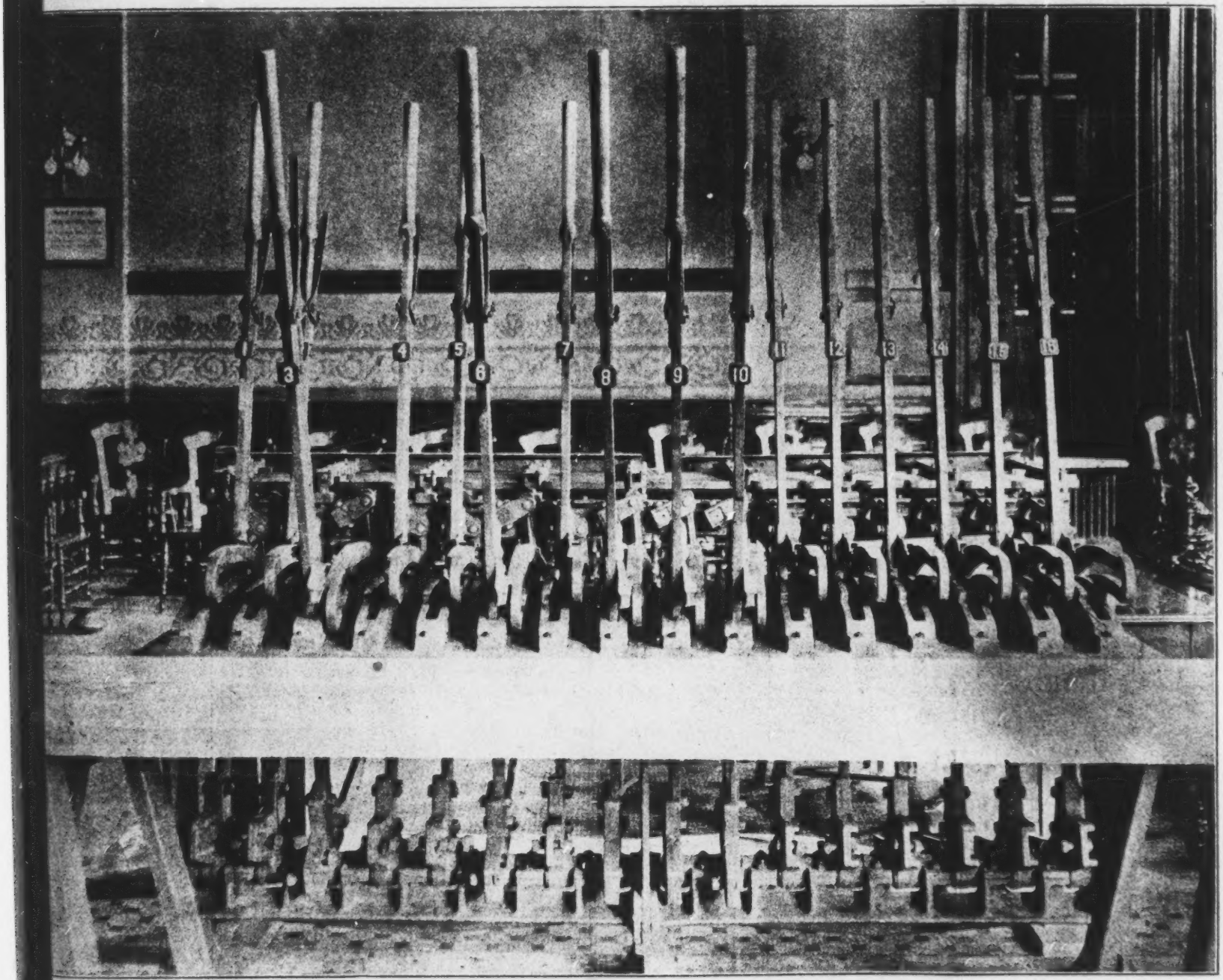
NOTE:—The workman in charge of the work, Engine Inspector and Air Brake Inspector will sign this report and hand it to the Engine House Foreman, who will approve same and forward to the Master Mechanic, or the Division Superintendent of Motive Power.

DEFENDANT'S EXHIBIT "A"

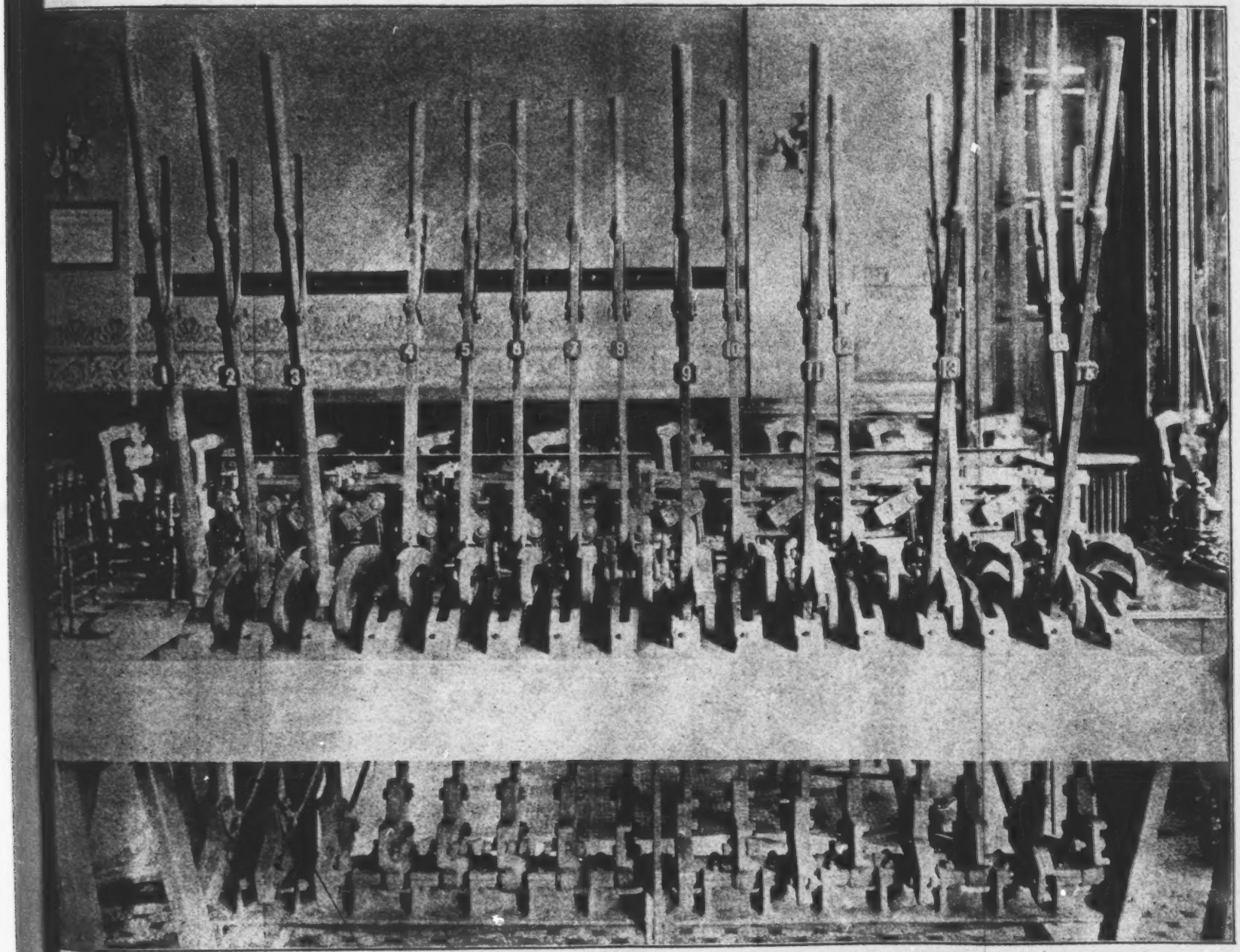


1179

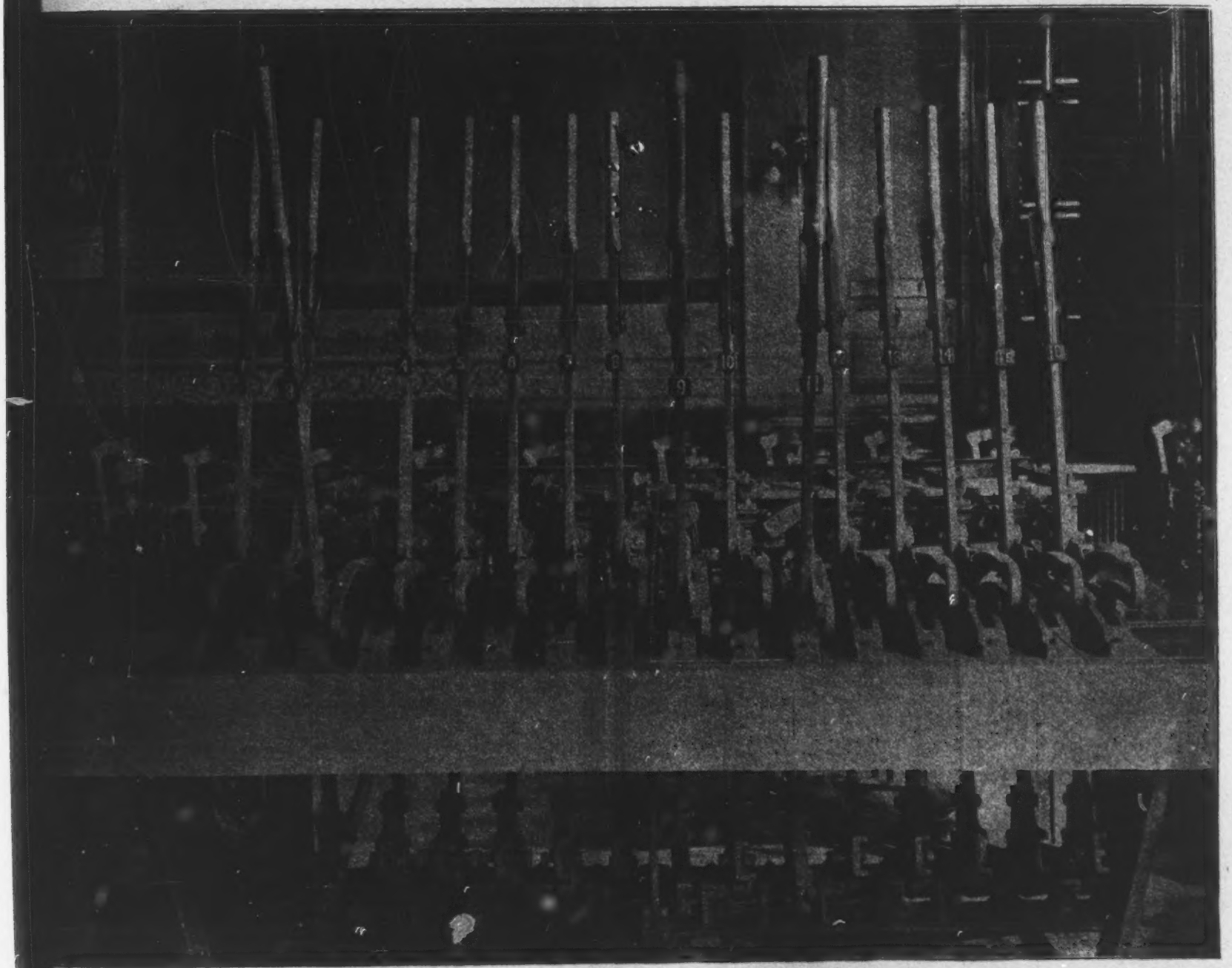
DEFENDANT'S EXHIBIT "B"



DEFENDANT'S EXHIBIT "C"



DEFENDANT'S EXHIBIT D



1180

1166 *Affidavit of No Opinion.*

STATE OF NEW YORK:

Court of Appeals.

JOHN W. KINNEY, Respondent,

vs.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO., Appellant.

STATE OF NEW YORK,
County of Erie, ss:

H. W. Huntington, being duly sworn, says, that he is an attorney associated with Locke, Babcock, Spratt & Hollister, and was formerly associated with firm of Hoyt & Spratt, attorneys of record for defendant herein; that no opinion was written by the Appellate Division when said court affirmed the judgment of the Supreme Court herein as deponent is informed and verily believes.

H. W. HUNTINGTON.

Sworn to before me, this 15th day of April, 1920.

PERCY R. SMITH,
Notary Public, Erie Co., N. Y.

(Here follow Plaintiff's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, and 9 and Defendant's Exhibits A, B, C, D, and G, marked pages 1167-1180, inclusive.)

1181 Supreme Court, Erie County.

JOHN W. KINNEY, Plaintiff,

vs.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Defendant.

I, John H. Meahl, County Clerk of Erie County and Clerk of the Supreme Court, Erie County, do hereby certify that the foregoing pages, numbered 1 to 1166, inclusive, plaintiff's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9; defendant's Exhibits, A, B, C, D, and G, and the foregoing Remittitur from the Court of Appeals, State of New York, dated June 1st, 1921, and filed in Erie County Clerk's office June 22, 1921, and the foregoing Order and Judgment, dated June 22nd, entered in Erie County Clerk's office on the 22nd day of June, 1921, contain a true and correct transcript of record and proceedings had in said Supreme Court, in the action of John W. Kinney against The New York Central & Hudson River Railroad Company, as the same remains of record and on file in Erie County Clerk's office.

In witness whereof, I have caused the seal of my office to be hereunto affixed, in the City of Buffalo, County of Erie and State of New York, on this 29th day of June, in the year of our Lord, One Thousand Nine Hundred and Twenty-One.

[Seal of the Clerk's Office for the County of Erie.]

JOHN H. MEAHL,
By CHAS. A. KLOCKE,
Dep. Clerk.

1182 STATE OF NEW YORK, *ss:*

Court of Appeals.

Pleas in the Court of Appeals held at Court of Appeals Hall, in the City of Albany, on the 31st day of May, in the year of our Lord one thousand nine hundred and Twenty-one, before the Judges of said Court.

Witness, The Hon. Frank H. Hiscock, Chief Judge, presiding.

R. M. BARBER,
Clerk.

Remittitur, June 1st, 1921.

JOHN W. KINNEY, Respondent,

agst.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO., Appellant.

Be it remembered, That on the 10th day of May in the year of our Lord one thousand nine hundred and twenty, The New York Central

Hudson River Railroad Co., the appellant in this case came here
the Court of Appeals, by Hoyt & Spratt its attorney and filed
he said Court a Notice of Appeal and return thereto from the
gment of the Appellate Division of the Supreme Court in and
the Fourth Judcial Department. And John W. Kinney the
ondent in said cause, afterward appeared in said Court of Appeals
Hamilton Ward his attorney.
Which said Notice of Appeal and the return thereto, filed as afore-
, are hereunto annexed.
Whereupon, The said Court of Appeals, having heard this cause
ued by Mr. Maurice C. Spratt of counsel for the appellant, and
Mr. Hamilton Ward of counsel for the respondent, and after due
deliberation had thereon, did order and adjudge that the
judgment of the Appellate Division of the Supreme Court
appealed from herein be and the same hereby is affirmed, with
.
nd it was also further ordered that the record aforesaid, and the
eedings in this Court, be remitted to the said Supreme Court,
e to be proceeded upon according to law.
herefore, it is considered that the said judgment be affirmed with
, as aforesaid.
nd hereupon, as well the Notice of Appeal and return thereto
esaid as the judgment of the Court of Appeals aforesaid, by it
n in the premises, are by the said Court of Appeals remitted into
Supreme Court of the State of New York, before the Justices
eof, according to the form of the statute in such case made and
ided, to be enforced according to law, and which record now
ains in the said Supreme Court before the Justices thereof, etc.

R. M. BARBER,
Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's Office.

Albany, June 1st, 1921.

hereby certify that the preceeding record contains a correct
script of the proceedings in said cause in the Court of Appeals,
the papers originally filed therein, attached thereto.

R. M. BARBER,
[L. S.] *Clerk.*

4 [Endorsed:] State of New York, Court of Appeals. John W. Kinney, Plaintiff-Respondent, against The New York tral & Hudson River Railway Company, Defendant-Appellant. milton Ward, Atty. for Plaintiff-Respondent, 104 Erie Co. Bank g., Buffalo, N. Y. Hoyt & Spratt, Attys. for Defendant-Appel-, 810-826 Fidelity Bldg., Buffalo, N. Y. Filed —— —, ——.

1185 At a Special Term of the Supreme Court Held in and for the County of Erie, at the City & County Hall, in the City of Buffalo, N. Y., on the 22nd Day of June, 1921.

Present: Hon. Charles B. Wheeler, Justice Presiding.

JOHN W. KINNEY, Plaintiff,

vs.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Defendant.

The above named New York Central & Hudson River Railroad Company, having appealed to the Court of Appeals of the State of New York, from a judgment of the Appellate Division, Supreme Court, Fourth Department entered in the office of the Clerk of the County of Erie on the 4th day of February 1920 and for $108.88 costs, which said judgment affirmed a judgment of the Supreme Court, Trial Term, entered in said Erie County Clerk's office on the 19th day of April 1919 for the sum of $35,853.99, and the appeal having been argued in the Court of Appeals and an order granted by said court on the 1st day of June 1921 affirming said judgment with costs, and a remittitur from the Court of Appeals having been sent back to this court to be filed in the Erie County Clerk's office.

Now on motion of Hamilton Ward, attorney for plaintiff, it is

Ordered, that the judgment of the Court of Appeals in the above entitled action be, and the same is hereby made the judgment of this court, and that the judgment of the Appellate Division

1186 Supreme Court, Fourth Department, entered in the office of the Clerk of the County of Erie on the 4th day of February 1920 for $108.88 costs, and the judgment entered in said Erie County Clerk's office on the 19th day of April 1919 for the sum of $35,853.99 in favor of the plaintiff and against the defendant be and the same are hereby in all things affirmed, and that judgment of this court be entered affirming said judgments, with costs of said appeal to be taxed against the defendant, The New York Central & Hudson River Railroad Company.

CHAS. B. WHEELER,
Justice Supreme Court.

Granted June 22, 1921.
G. W. LAUGHLIN,
Sp. Dep. Clerk.

1187 Supreme Court, Erie County.

JOHN W. KINNEY, Plaintiff,

vs.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Defendant.

STATE OF NEW YORK,
County of Erie, City of Buffalo, ss:

John E. Montgomery being duly sworn, deposes and says that he is an attorney at law in the office of Hamilton Ward, attorney for the plaintiff herein. That a judgment was rendered in the above entitled action and entered in the Erie County Clerk's office on the 19th day of April 1919 for $35,853.99 and that thereafter the defendant appealed to the Appellate Division, Supreme Court, Fourth Department, from such judgment and the appeal was duly argued and affirmed, and judgment of affirmance was entered in the Erie County Clerk's office on the 4th day of February 1920 with $108.88 costs, and that thereafter the defendant appealed to the Court of Appeals of the State of New York, and said appeal was duly argued in said Court of Appe*las*, and an order was made and entered by said Court of Appeals on the 1st day of June 1921 affirming said judgment with costs, and the remittitur from the Court of Appeals has been sent to this Court for entry in the Erie County Clerk's office, and plaintiff asks for an order of this court making the judgment of the Court of Appeal*d* the judgment of this court.

JOHN E. MONTGOMERY.

Sworn to before me this 21 day of June, 1921.

JOSEPH JAMES,
Comm. of Deeds in and for the City of Buffalo, N. Y.

1188 [Endorsed:] Supreme Court, County of Erie. John W. Kinney, Plaintiff, vs. The New York Central & Hudson River Railroad Company, Defendant. Copy. Affidavit & Order Making Judgment of Court of Appeals Judgment of Supreme Court. Hamilton Ward, Attorney at Law, Rooms 104-109 Erie County Savings Bank Building, Buffalo, N. Y. Filed Erie County Clerk's office, June 22, 1921.

1189 Supreme Court, Erie County.

JOHN W. KINNEY, Plaintiff,

vs.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Defendant.

The above named defendant, The New York Central & Hudson River Railroad Company, having appealed to the Court of Appeals,

from a judgment of the Appellate Division, Supreme Court Fou
Department, entered in the office of the Clerk of the County of E
on the 4th day of February 1920 for $108.88 costs and disbu
ments, and affirming the judgment entered in said Erie Cou
Clerk's office on the 19th day of April 1919 in favor of the pla
tiff and against the defendant for the sum of $35,853.99, and
Court of Appeals having heard said appeal and ordered and
judged that the judgment so appealed from be in all things
firmed, and judgment directed for the plaintiff and against the
fendant with costs, and the remittitur of the Court of Appeals h
ing been sent back to the Supreme Court and filed in the office
the Clerk of the County of Erie, and an order having been d
made making the judgment of the Court of Appeals the judgm
of this court and directing entry of judgment of affirmance in
court with costs of appeal against the defendant,

Now, on motion of Hamilton Ward, attorney for plaintiff, it i

Adjudged, that the judgment of the Appellate Division Supr
Court, Fourth Department, entered in the office of the C
1190 of the County of Erie on the 4th day of February 1920
$108.88 costs and disbursements, and the judgment of
Supreme Court, Erie County entered in said Clerk's office on
19th day of April 1919 for $35,853.99, be and the same are in
things affirmed, and that the plaintiff-respondent recover of the
fendant-appellant, New York Central & Hudson River Railr
Company, the sum of Two hundred thirty-one and 24/100 Dol
($231.24) costs and disbursements, and that plaintiff have execut
against said defendant therefor.

Judgment signed this 22 day of June 1921.

CHAS. A. KLOCKE,
Dep. ——

1191 [Endorsed:] Supreme Court, County of Erie. John
Kinney, Plaintiff, vs. The New York Central & Hudson R
Railroad Company, Defendant. Copy. Judgment. Hamil
Ward, Attorney at Law, Rooms 104-109 Erie County Savings B
Bldg., Buffalo, N. Y. Filed Erie County Clerk's office, June 22. 19
P. M. 12.33.

1192 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honor
the Judges of the Supreme Court of the State of New Y
Greeting:

Being informed that there is now pending before you a sui
which John W. Kinney is plaintiff, and The New York Centr
Hudson River Railroad Company is defendant, and we, being
ing for certain reasons that the said cause and the record and
ceedings therein should be certified by the said Supreme Court

removed into the Supreme Court of the United States, Do
1193 hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-second day of October, in the year of our Lord one thousand nine hundred and twenty-one.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 28,346. Supreme Court of the United States, October Term, 1921. No. 391. The New York Central & Hudson River Railroad Company vs. John W. Kinney. Writ of certiorari. Filed Erie County Clerk's Office, Nov. 3, 1921. 33/197-610.

1194 Supreme Court of the United States, October Term, 1921.

No. 391.

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Petitioner,

vs.

JOHN W. KINNEY, Respondent.

It is hereby stipulated by and between the Attorneys for the petitioner and respondent in the above entitled action that the certified transcript of record now on file in the office of the clerk of the Supreme Court of the United States may be considered and taken as the return to the writ of certiorari herein, and that no further return to said writ need be filed by the Supreme Court of the State of New York other than a certified copy of this stipulation.

Dated: Buffalo, N. Y., November 7, 1921.

HAMILTON WARD,
Attorney for Petitioner.
MAURICE C. SPRATT,
Attorney for Respondent, John W. Kinney.

STATE OF NEW YORK,
County of Erie, ss:

I, John H. Mealhl, Clerk of the County of Erie, and also Clerk of the Supreme and County Courts for said County, the same being Courts of Record, do hereby certify that I have compared the annexed copy of Stipulation with the original thereof, entered and on file in the office of the Clerk of Erie County, and that the same is a correct transcript therefrom and of the whole of said original.

In witness whereof, I have hereunto set my hand and affixed the seal of said County and Courts at Buffalo, this 15th day of Nov., 1921.

[Seal of Clerk's Office for the County of Erie.]

JOHN H. MEAHL,
Clerk.

No. 20040.

1195 [Endorsed:] 391—28346. Supreme Court of the United States, October Term, 1921. No. 391. The New York Central and Hudson River Railroad Co., Petitioner, vs. John W. Kinney, Respondent. Copy. Stipulation. Locke, Babcock, Spratt & Hollister, Attorneys for Petitioner, 810-826 Fidelity Building, Buffalo, N. Y.

1196 [Endorsed:] File No. 28,346. Supreme Court U. S., October Term, 1921. Term No. 391. N. Y. C. & H. R. R. R. Co., Petitioner, vs. John W. Kinney. Writ of certiorari and return. Filed Nov. 21, 1921.

JUL 1 1921
JAMES D. MAHER,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1921.

No. [redacted]110

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,

Petitioner,

vs.

JOHN W. KINNEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT OF PETITION.

MAURICE C. SPRATT,
Attorney for Petitioner.

HERBERT W. HUNTINGTON,
Of Counsel.

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York, commanding it to certify and transmit to this court, on a day to be therein named, a full and complete transcript of the record and all proceedings had in the various Courts of the State of New York in said cause, in so far as the same appear of record or are on file in said Supreme Court of New York, to the end that said cause may be reviewed and determined by this court, as provided by law, and that your petitioner may have such relief and remedy in the premises as this court may deem appropriate, and justice and right may require.

I.

The statement of the case is as follows:

1. Your petitioner was at the time of the commencement of the action a domestic railroad corporation organized and existing under and by virtue of the laws of the State of New York.

2. On October 12, 1908, while employed by the defendant as a locomotive engineer, plaintiff met with the injuries complained of.

3. On or about February 6, 1909 notice was served by plaintiff on defendant under the Employers' Liability Act of the State of New York, being Chapter 600 of the Laws of 1902. (R, Folios 29-33).

4. On or about June 30, 1909, plaintiff commenced an action against the petitioner in the Supreme Court of the State of New York, Erie County. The complaint, found at folios 12-34 of the Record, alleged among other things:

"First: That the defendant New York Central and Hudson River Railroad Company is a domestic corporation, engaged in the business of operating a steam railroad *in and through various portions of the State of New York and especially within the City of Buffalo.*

* * * * * * * * *

Third: That heretofore, and on the 12th day of October, 1908, and for some time prior thereto, the plaintiff had been in the employ of the defendant, New York Central and Hudson River Railroad Company, as a locomotive engineer, and was engaged in operating a locomotive owned by such defendant *in and over its tracks within the State of New York.*" (Italics ours) (Record, Fols. 13, 14).

5. That your petitioner on or about August 4, 1909 answering the complaint,

A. Admitted the occurrence of the accident but denied each and all of the allegations of negligence on its part set forth in the complaint.

B. Alleged as a separate defense that the accident occurred through the negligence of plaintiff or competent fellow servants.

C. Set up as a separate defense assumption of risk. (Answer is found at folios 61-69 of the Record).

Various trials before amendment.

6. That upon the issue so joined said action was brought to trial in the Supreme Court, Erie County, New York, on February 3, 1910, and resulted in a verdict for the plaintiff of $20,000 which was set aside by the Trial Court and a new trial granted on the authority of Hallock vs. N. Y. O. & W. R. R. Co., 197 N. Y., 450, which authority established the principle that a head-end brakeman was a fellow servant and not a vice-principal

7. *Second trial* was commenced January 3, 1911, on the issues framed by the original pleadings and resulted in a judgment for the plaintiff of $23,000 which judgment was reversed by the Appellate Division, Fourth Department and judgment of reversal entered in Erie County Clerk's office January 8, 1912.

8. *Third trial* was commenced October 15, 1912, on the issues framed by the original pleadings and resulted in a judgment for the plaintiff of $12,000. The judgment was affirmed by the Appellate Division, Fourth Department but reversed by the Court of Appeals of the State of New York. (Kinney vs. N. Y. C. & H. R. R. R. Co., 217 N. Y., 325).

Amendment of complaint setting up engagement in interstate commerce.

9. On March 15, 1916, *about seven and a half years after the injury occurred, and the cause of action, if any, accrued,* application was made by plaintiff to the Special Term of the Supreme Court, Erie County, for permission to amend his complaint by setting up, among other things, engagement in interstate commerce. On December 6th, 1916, an order permitting the service of the amended complaint was granted under the terms of which order the amended complaint was deemed to have been served March 15, 1916, the date of the application for leave to amend.

10. The amended complaint alleged:

"AND PLAINTIFF FURTHER ALLEGES upon information and belief, that both the

plaintiff and the defendant, at the times, and in the manner above set forth, were then and there engaged in interstate commerce, and were subject to the provisions of an Act of Congress known as the Federal Employers' Liability Act which took effect in April, 1908."

11. Petitioner made due and timely objection to granting of the amendment upon the ground that the requested amendment introduced a new cause of action under the Federal Employers' Liability Act which said new cause of action was barred by the Statute of Limitations contained in Section 6 of the said Federal Employers' Liability Act. The order of the Special Term was affirmed by the Appellate Division, Fourth Department. (Kinney vs. N. Y. C. & H. R. R. R. Co., 98 Misc., 11, Affirmed 171 A. D. 948).

Answer of petitioner to the amended complaint.

12. Your petitioner thereupon filed and served its answer to the amended complaint (Record, Fols. 71-87).

A. Denying the allegations of negligence.

B. Denying that, at the time of the accident the plaintiff and the defendant were engaged in interstate commerce or were subject to the provisions of the Federal Employers' Liability Act.

C. Set up as separate and distinct defenses, contributory negligence, assumption of risk and negligence of a fellow servant.

D. *Pleaded as a separate and distinct defense the Statute of Limitations contained in Section 6 of the Federal Employers' Liability Act,* alleging:

"For a second, separate and distinct defense to the alleged cause of action in the complaint set forth, this defendant further avers and alleges:

That the original action was commenced on the 30th day of June, 1909, setting forth a cause of action under the New York State Employers' Liability Act, and that issue was joined by the service of the defendant's answer on August 4, 1909; that reference is hereby made to such complaint as a part hereof; that recovery was sought under said Employers' Liability Act exclusively and that the case was tried three times upon this sole cause of action; that after the judgment entered upon the third trial in October, 1912, had been reversed by the Court of Appeals, the plaintiff herein served an amended complaint on the 7th day of December, 1916, in which a new cause of action is set forth for the first time under the Federal Employers' Liability Act by the amendment to the original complaint, wherein the plaintiff alleges, upon information and belief, that both the plaintiff and defendant, at the time and in the manner set forth in the complaint, were then and there engaged in interstate commerce and subject to the provisions of an act of Congress known as The Employers' Liability Act, which took effect in April, 1908.

The defendant further alleges that the accident upon which the original cause of action was based, occurred on the 12th day of October, 1908; that the cause of action under the Federal Employers' Liability Act was not pleaded or commenced until the service of the amended complaint on the 7th day of December, 1916, more than eight years after the date of the accident, and that said cause of action

under the Federal Employers' Liability Act as set forth by said amendment, is barred by the Statute of Limitations contained in said Act, which provides that no action shall be maintained under said act unless commenced within two years from the day the cause of action accrued.

The defendant further alleges: That the plaintiff ought not to have or to maintain this action because the same was not brought or maintained under said Employers' Liability Act, passed by the Congress of the United States, and which was approved April 22nd, 1908, because the same was not brought or instituted thereunder within two years from the time that the said alleged cause of action accrued thereunder."

13. The fourth trial resulted in a disagreement by the jury. The fifth trial resulted in a verdict in favor of the defendant of no cause of action, which was reversed by the Appellate Division for error in the charge.

14. The sixth trial resulted in a verdict for the plaintiff, the jury finding:

a. That the plaintiff and the defendant were engaged in interstate commerce.

b. That the total damage was $40,000 but that Kinney was chargeable with contributory negligence to the amount of $8,000 and rendered a general verdict against the defendant for $32,000.

15. Your petitioner duly and timely appealed from the judgment entered upon the verdict of the jury and from the order denying petitioner's motion for a new trial to the Supreme Court, Appel-

late Division, Fourth Department of the State of New York, which court unanimously affirmed the judgment and order appealed from.

16. The said Appellate Division granted petitioner's application for leave to appeal to the Court of Appeals, which appeal was duly taken.

17. *The Court of Appeals by a divided court affirmed the judgment and order, without opinion, Hiscock, C J., McLaughlin and Crane dissenting.*

18. That the order of the Supreme Court making the judgment and order of the Court of Appeals the judgment and order of the Supreme Court was duly entered in the Clerk's office of the County of Erie on the 22nd day of June, 1921, and served upon your petitioner June 22, 1921, and final judgment entered thereon, and that final judgment has been rendered in this action by the highest court of the State of New York in which a decision in this cause could be had, which judgment became final June 22, 1921.

II.

That the questions and propositions involved in this case and the exceptions submitted to the courts below are substantially as follows:

1. Whether the amendment to the complaint, seven and one-half years after the cause of action accrued, alleging and asserting for the first time the engagement of the plaintiff and the defend

ant in interstate and invoking for the first time the aid of the Federal Employers' Liability Act, introduced a new and different cause of action from that originally set forth in the plaintiff's complaint.

2. Whether an amendment so changing the cause of action relates back to the commencement of the action or will be regarded as the commencement of a new action at the time of the allowance thereof as to which the running of the limitation of Section 6 of the Federal Employers' Liability Act was not therefore arrested.

3. Whether, after the amendment was allowed your petitioner having plead and proven the statute of limitation contained in Section 6 of the Federal Act was entitled to judgment.

4. Whether the court erred in refusing to grant defendant's motion for a nonsuit (R. Fol. 1416) and to direct a verdict for the defendant at the close of all the testimony (Fols. 3006, 3008) upon the ground that there was no evidence tending to show that the plaintiff at the time of the accident was engaged in interstate commerce.

5. Whether the Trial Court erred in submitting to the jury the question of plaintiff's engagement in interstate commerce to which exception was duly taken by your petitioner (R. Fol. 3008).

6. Whether the Trial Court erred in refusing to instruct the jury as requested by counsel for your petitioner.

"That there is no evidence in the case from which the jury can find that the plaintiff was engaged in interstate commerce at the time of the accident." (R. Fol. 3349).

7. Whether the Trial Court erred in instructing the jury (R. Fols. 3247, 3296-3297).

"If the Federal Employers' Liability Act applies, the case must be determined according to the law controlled by it, and in that case *it is a question of fact for the jury to determine whether Kinney assumed the risk inherent in his employment, and also of the negligence of the defendant or of a fellow servant, if such risk is shown by defendant to have been known by plaintiff, or if it were so obvious that it must be presumed that a person of ordinary prudence would have known it.*" (Italics ours.)

to which exception was duly taken by your petitioner.

8. Whether the trial court erred in charging the jury in substance

"that even though plaintiff knew of the defects in the engine when he started or discovered them en route he could not be charged with assumption of risks unless he knew and appreciated the particular danger arising therefrom in the obstruction of his vision, and preventing him from seeing the dwarf signal *at the critical moment of the accident.*" (Italics ours) (R, Fols. 3247-3249, 3299-3302.)

9, Whether the trial court erred in refusing to charge as requested by your petitioner at folios 3337-3340:

"That if the plaintiff had noticed on his first trip to Tonawanda that the escape of steam from the engine would interfere with his taking dwarf signals and he did not exercise his privilege of sidetracking his engine or

securing another engine on his return to East Buffalo, but started on his trip to Black Rock, that he assumed the risk of the continued leaking of steam at the time of the accident."

and by charging as a modification to the request, the precise charge set forth in No. 8, above, to wit, that plaintiff did not under any circumstances assume the risk unless he

"knew and appreciated the particular danger* * * * at the critical moment of the accident."

10. Whether the trial court erred in charging the jury at folios 3309-3310:

"The Court: If Kinney saw the dwarf signal showing green at, or as he approached Hertel avenue, he had the right to proceed, and if such light remained until after Kinney reached a point where he could not see it and it were afterwards changed by the towerman to purple, the jury can find that Kinney was not chargeable with contributory negligence *unless he received from Mullen a signal which Kinney understood to be a stop signal,* in time for Kinney to avoid the accident by stopping his engine." (Italics ours).

thus absolving Kinney from contributory negligence even though he misunderstood a perfect stop signal properly conveyed or given to him by Mullen.

11. Whether the trial court erred in charging the jury at folios 3314:

"Regardless of whether Mullen was attempting to give a proceed or a stop signal, Kinney cannot be charged with contributory negligence for not stopping his engine before he had reached the point where it was impossible to stop it in time to prevent the accident, unless he, from his position, had reason-

able ground to doubt whether the signal was a proceed or a stop signal."

thus again absolving Kinney from contributory negligence even if Mullen was giving a perfect and clear stop signal, which Kinney was bound to recognize as such, and obey.

12. That all of the aforesaid propositions, and exceptions were duly raised and urged by your petitioner before the trial court, the Appellate Division, and the Court of Appeals of the State of New York.

III.

And your petitioner further avers that the present case is one in which it is proper for this court to issue a writ of certiorari, for the following reasons, among other things:

1. Because it was error for the courts of New York State to hold that your petitioner was not entitled to judgment after having plead and proven the statute of limitations contained in Section 6 of the Federal Employers' Liability Act.

2. Because it was error for the courts of New York State to hold that the amendment to said complaint did not introduce a new and different cause of action.

3. Because it was error for the courts of New York State to hold that the original complaint stated a cause of action under the Federal Employers' Liability Act and that the amendment merely expanded or amplified what was alleged in support of the cause of action already asserted.

4. Because, in the above respects there is a conflict between the law as expounded by the courts of the State of New York, and the Federal Courts, and many of the state courts, as set forth in the brief served herewith.

5. Because the question of the application of Section 6 of the Federal Employers' Liability Act is here, your petitioner believes, squarely presented to this court for the first time and public interest requires the decision of this court on these questions not only because of the conflict of decisions before referred to but because there is a manifest confusion as to the interpretation of the Renn, Wulf and other decisions of this Honorable Court, as will be more fully pointed out in the brief accompanying this petition.

6. Because the state courts erred in holding and deciding that there was evidence in the case tending to show that the plaintiff was at the time of the accident engaged in interstate commerce.

7. Because, if plaintiff's engagement in interstate commerce was established, the trial court erroneously instructed the jury on the defenses of assumed risk and contributory negligence as before indicated under II, subdivisions 7-11.

8. Because, your petitioner has, by reason of all of the matters before set forth, been denied rights, privileges and immunity under the Federal Employers' Liability Act, which rights, privileges and immunity were specifically set up and claimed before the trial court, the Appellate Division and the Court of Appeals of the State of New York.

That your petitioner, as required by the law of this court has exhausted every possibility of redress before filing an application for the granting or the issuance of the writ of certiorari herein and being without other means for the redress of its grievances petitioner presents here its petition for certiorari accompanied by a complete and duly certified transcript of the entire record of all proceedings had in this cause together with a brief of its argument upon the questions of law involved.

Wherefore, your petitioner respectfully prays that this Honorable Court grant a writ of certiorari in this case to the Supreme Court of the State of New York and cause the record in this case to be brought to this Honorable Court for final review and determination.

THE NEW YORK CENTRAL AND
HUDSON RIVER R. R. CO.,
By MAURICE C. SPRATT,
Its Attorney.

HERBERT W. HUNTINGTON,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term A. D. 1921.

THE NEW YORK CENTRAL AND HUDSON RIVER R. R. CO., *Petitioner.*	
vs.	
JOHN W. KINNEY, *Respondent.*	

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

The questions involved and the unusual length of the record makes it difficult to present either a brief petition or statement of the facts.

In this brief the respondent will be referred to as plaintiff and the petitioner as defendant such being the designation of each respectively in the court below.

Annexed to the record submitted herewith is Plaintiff's Exhibit 1, a map showing the physical situation at the place of accident.

On October 12, 1908, plaintiff, an experienced locomotive engineer was injured when a freight

engine which he was running came into collision with a fast mail train known as Michigan Central No. 3 at the junction of the Belt Line tracks of the defendant at what is known as tower 55. (Map Ex. 1).

The defendant's railroad from Buffalo to Niagara Falls consists of two tracks. At the point of collision they run about due north and south but they are nevertheless known in operation as the "East-bound" and "West-bound" tracks. (Map. Ex. 1).

Trains moving from Buffalo to Niagara Falls use the West-bound track and trains from the Falls to Buffalo use the East-bound track.

The defendant also operates what is known as a "Belt Line" which consists of two tracks which connect with its main line at East Buffalo and passing around the easterly and northerly sides of the city join with the Niagara Falls tracks at two points, one point being at tower "H" and the other at tower "55" where the accident occurred. This construction of tracks formed what in railroad parlance is called a "Y" from its resemblance to that letter of the alphabet (Map Ex. 1).

An engine starting at one point of this "Y" or triangle and traversing its three sides to the starting point will reverse itself exactly as if placed on a turntable and turned from (to illustrate) a "facing east" position to a "facing west" position.

It was while plaintiff was engaged in turning his engine on the "Y" that the accident at tower 55 occurred.

Plaintiff had just hauled a train from East Buffalo to Black Rock and had left it upon the "Southern" track the entrance to which is shown just to the left of Tower "H" (Map. Ex. 1).

Plaintiff had been instructed to take the caboose off the train which he had left on the "Southern" track and to put it on the rear of a train which was on a track known as the "Fence Track" but not shown on the Map Ex. 1. When his engine was uncoupled from his train he ran it out upon the Niagara Falls west-bound track, backed to tower "H", then proceeded in upon the southern track for the purpose of coupling to the caboose. He coupled the forward end of the engine to the caboose and after uncoupling the caboose from the train backed with it to tower I (Map Ex. 1).

On the next movement from tower "I" to tower "55" the caboose was therefore ahead of the engine and the movement was made against the current of traffic, or in other words, moved westerly on the east-bound or left-hand track of the "Y." This was for the purpose of enabling him to cross to the east-bound main or Niagara Falls track so that he might move with the current of traffic, on that track back to Black Rock. This intended movement of necessity caused him to cross the west-bound Niagara Falls track (Map Ex. 1).

Kinney knew that a Michigan Central train and a New York Central train were due to pass tower

"55" at about the time of the accident (R. Fol. 623).

Under Rule 502 (R. Fols. 701-702) Kinney was in command of the engine on this movement, conductor Matler being then engaged with the yardmaster (Fols. 1790, 1987).

Other rules of the company with which the plaintiff was familiar provided among other things, as follows:

> "27. A signal imperfectly displayed, a white light by night on any fixed signal or the absence of a signal at a place where a signal is usually shown, must be regarded as a stop signal and the fact reported to the superintendent."

Rule 106, provided:

> "In all cases of doubt or uncertainty the safe course must be taken and no risks run."

The accident occurred after dark (Fol. 494). The signal which was to govern Kinney's movement against the current of traffic onto the eastbound track was known as "Dwarf No. 6," which is located between the two "Y" tracks and 87 feet distant from the point of the accident (Map Ex. 1, Fol. 411).

A green light displayed on Dwarf 6 indicated clear, or that Kinney might proceed by it, and make the movement desired unless the signal was changed before he reached it, in which event however the switches could not be changed until he had come to a full stop. (Rule 18, Fols. 362, 363, 531-533, 624).

A purple light displayed upon the dwarf signified danger and was a command to stop.

A light imperfectly displayed on the dwarf or the absence of a light were in either event stop signals, and prohibited a movement past the dwarf.

Kenney had a right to proceed as far as Dwarf 6, irrespective of whether the dwarf light was at clear or danger. Whether he proceeded past it depended on the signal displayed when he reached it (Fol. 1097).

Kinney, as well as every other witness sworn in the case, concedes that the dwarf signal was superior to every other signal and that if it could be seen it absolutely controlled the movement (Fols. 659, 662, 1079, 1080, 799, 801, 2748, 2750, 2762).

Kinney claims that the light on Dwarf 6 looked green to him (Fols. 1350, 1351) when he was about at Hertel avenue (Map Ex. 1) or about 500 feet from the dwarf (Fols. 411, 342). From this point he said he did not see the fixed signal again (Fols. 517-518), attributing his inability to see it to the steam that was escaping from his engine (Fols. 351, 534, 536).

The fact is that he paid no further attention to this signal but relied entirely on the hand signals given to him by Mullen the brakeman on the head end of the caboose (Fol. 529).

The testimony of every witness in the case except Kinney is that the light on Dwarf 6 was purple, meaning stop and every circumstance disclosed by the record indicates not only that the signal was against Kinney but that the switches were set for the east-bound and west-bound main

line tracks. (R. Fols. 1857, 1870, 1874, 1903, 1912, 1994-1996, 1472--1474, 2663-2665, 1491, 2075, 2082, 2183, 2186, 2193, 2253, 2134, 2137, 2138, 2170, 1804, 2263, 2266, 2436).

The signals and switches for all tracks at this point (tower 55) were handled from the tower by means of an interlocking machine, which was so constructed that the towerman could not give conflicting signals if the interlocking plant and the signal connections were in proper working condition, which was conclusively established (Fols. 2663-2665, 1472-1474).

Plaintiff admits that the steam obstruction was temporary and that by shutting off his steam or stopping his engine he could have seen the dwarf signal (R. Fols. 514, 534, 541, 609, 610). His engine was moving not to exceed 6 or 7 miles an hour (Fol. 345) and could have been stopped in from 2 to 4 feet (Fols. 624, 625).

Kinney's further claim is that, Mullen the brakeman, whose signals he was following, had from time to time from about Hertel, been giving him easy come ahead signals. That just before the collision Mullen gave him a faster come ahead signal and for that reason alone he attempted to stop his engine (Fol. 698). If, as claimed by Kinney, the dwarf signal was clear and Mullen's signals all come ahead signals there certainly was no reason why Kinney should reverse his engine merely because Mullen gave him a faster come ahead signal.

Brakeman Mullen who gave the signals and every other witness in the case who saw the signals given by Mullen testified that the signals for

5 or 6 car lengths before the dwarf was reached were stop signals and that they were given repeatedly down to the very moment of the accident. (R. Fols. 1857, 1858, 1887, 1888, 1917, 1918, 1996, 1997, 1998, 1497, 1583, 1584, 2085, 2087).

Plaintiff admits although reluctantly, that the steam also interfered to some extent with his observation of Mullen's signals, upon which he says he absolutely relied. He testified folio 697:

"The Court: He asks you now definitely whether or not this steam obscured your seeing those signals, and you can say yes or no.

A. No, *not wholly.*

Q. Did they to some extent?

A. *To some extent, yes.*

And at folios 1364-1365:

"Q. Now, didn't the steam to some extent interfere with your seeing Mullen's signals in going from tower I to where the accident occurred?

A. *It might have to some extent.*

Q. Didn't it, and didn't you testify that it did on the second trial at pages 154 and 155?

A. I can't answer that question.

Q. You can't answer that?

A. No.

Q. (Reading). 'Q. Now, did the steam interfere with your taking Mullen's signals?

A. *To some extent, it did?'* Is that true?

A. *Yes, sir.*"

Kinney testifies that before he took the engine out on the first trip she was leaking steam from the belly of the boiler, from the left piston rod, from the union of the steam pipe and injector, from the throttle, and in the firebox (Fols. 442-449). She continued to leak steam from these places on the trip to Tonawanda (Fol. 474).

He had trouble in observing at least two dwarf signals on this trip (Fols. 553-563).

His next trip was to take a coal train to Black Rock (Fol. 263). The steam was getting worse all the time (Fols. 477, 482). Kinney admitted that he had a right to inspect the engine before taking it out and if anything was wrong to have it corrected (Fols. 588-589). He was not required to take the engine out at all unless it was satisfactory to him, but could have demanded another engine. If trouble developed on the road he had a perfect right to sidetrack the engine and call for another. (Fols. 1067, 1068, 1100, 999-1006).

Other facts will be discussed under the various points of this brief.

POINT I.

The amendment to the complaint alleging engagement of the plaintiff and defendant in interstate commerce introduced an entirely new cause of action, and having been made more than two years after the cause of action accrued was barred by the Statute of Limitations contained in Section 6 of the Federal Code. The Statute having been pleaded and proven the defendant was entitled to judgment.

Argument.

The question here involved is whether the plaintiff after exploiting his cause of action solely under the state statute for eight years, can, in an

emergency, abandon his claim under the state statute and by amendment set up for the first time facts tending to bring him within the protection of the Federal Statute.

While this court has upheld amendments where the original complaint pointed although imperfectly to a cause of action under the laws of Congress, as in

Seaboard Air Line Ry. vs. Renn, 241 U. S., 290,

or where the amendment involved merely the substitution of the personal representative of the deceased, as in

Missouri, Kan. & Texas Ry. Co. vs. Wulf, 226 U. S., 570,

we do not find that this court has yet passed upon this question where the facts were as set forth herein, except that the logic of the opinion in the Renn case leads unerringly to the conclusion that under facts similar to those in this case the amendment would not have been permitted.

It has been repeatedly stated by this Honorable Court that the Federal Employers' Liability Act is paramount and exclusive and supersedes all state law in the matter with which it deals.

Seaboard Air Line Ry. v. Kenney, 240 U. S., 489.

Second Employers' Liability Cases, 223 U. S. 1.

St. L., I. M. & S. Ry. v. Hesterly, 228 U. S., 702.

Wabash R. R. v. Hayes, 234 U. S., 86.
St. L. and San Francisco Ry. v. Seale, 229 U. S., 157.
M. C. R. R. Co. v. Vrieland, 227 U. S., 59.
Seaboard Air Line Ry. v. Horton, 233 U. S., 493.

Section 6 of the Federal Employers' Liability Act passed April 22nd, 1908, as amended by the Act of April 5, 1910, provides:

> "Sec. 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued."

The accident to the plaintiff occurred on October 12th, 1908. If the plaintiff and defendant were at the time engaged in an act of interstate commerce, the plaintiff's cause of action accrued on that day.

As in all such cases there was some uncertainty as to what the courts would hold was employment in interstate commerce. *The same uncertainty exists today.* There was however, no uncertainty or no ambiguity in the language of the statute providing that no action should be maintained under that statute unless commenced within two years from the day the cause of action accrued Whatever may have been the doubts as to the application of the statute or the doubts as to its constitutionality, the requirement that an action must be commenced within two years was perfectly plain. To contend that in the face of the express limitations of the act it was permissible to wait more than two years from the accrual of th

cause of action, or as in this case for eight years, to see how the courts construed the statute or whether it would be held constitutional under the attacks made upon it, is absolutely absurd, and is no excuse for ignoring the plain mandatory provisions of Section 6 of the Act. These were the excuses offered by the plaintiff and his attorney as grounds for the amendment. (Kinney vs. N. Y. C. & H. R. R. R. Co. 98 Misc. 11).

The second Federal act was declared constitutional December 15, 1912 (Second Employers' Liability cases, 223 U S. 1) and yet plaintiff did not ask for the amendment until March 4th, 1916, nearly four years later.

No claim has been made or can be made *that the plaintiff attempted to maintain or commence any action under the Federal Statute* for eight years after the cause of action accrued.

The original complaint alleged (Fols. 13, 14):

"First: That the defendant New York Central and Hudson River Railroad Company is a domestic corporation, engaged in the business of operating a steam railroad *in and through various portions of the State of New York, and especially within the City of Buffalo.*

Third: That heretofore, and on the 12th day of October, 1908, and for some time prior thereto, the plaintiff had been in the employ of the defendant, New York Central and Hudson River Railroad Company, as a locomotive engineer, and was engaged in operating a locomotive owned by such defendant *in and over its tracks within the State of New York.*"

The allegations of the complaint generally, and as above quoted, contain no allegations even suggesting that either plaintiff or defendant was engaged in interstate commerce, but, on the contrary, plainly assert that neither was so engaged.

The cause of action was based squarely upon the New York Employers' Liability Act. There was not only an allegation in the complaint (21) of the service of a notice under the provision of said act, but a copy of the notice alleged to have been so served was attached to the complaint (Fol. 23). It is obvious that great care was taken by the plaintiff to bring himself safely within the provisions of the Employers' Liability Act of the State of New York.

Furthermore, upon none of the first three trials of this case was any proof given of interstate commerce nor was it even suggested that either might have been so engaged. Nor did the defendant's answer set up engagement in interstate commerce as a defense. For eight years this suit was absolutely silent as to interstate commerce.

The affidavit of Mr. Ward, plaintiff's counsel, filed in the Supreme Court, Appellate Division, Fourth Department, with the papers on appeal from the order granting the amendment, show that the plaintiff did not intend to bring his action under the Federal statute or to state a cause of action thereunder.

Mr. Ward's affidavit at folios 52-54 stated:

"As to the proposed amendment setting

up the question of interstate commerce, deponent alleges that while the statute was adopted before the commencement of this action, yet the application of the statute was not understood by the profession generally, until developed by various decisions of the Court. That what is, and what is not interstate commerce, was unsettled, and that under the authority of Van Brimmer vs. Texas & Pacific Railway Company, 190 Federal 394, and similar cases, *deponent was of the opinion that the plaintiff in this action was not engaged in interstate commerce;* that in the case of Carr vs. The New York Central R. R. Co., reported in 157 A. D., 941, 35 Supreme Court Reporter 780, the Supreme Court of the United States overruled the authorities before mentioned, *and it would now appear that the plaintiff was engaged in interstate commerce, in accordance with the facts set forth in his affidavit;* that the Carr case has been decided since the last trial of this action." (Italics ours.)

Plaintiff in his affidavit used upon the motion stated as follows (Folios 45-48):

"That as to the second proposed amendment, deponent alleges that at the time of the accident, and for sometime prior thereto, he was operating an engine engaged in general switching, in the yards of the New York Central Railroad Company in Buffalo and vicinity; that he moved loaded and empty cars destined for points outside the State and inside the State, and cars that had come from outside the State and from within the State, and that such movements were mingled together indiscriminately; that at the time of the accident deponent had taken a train of loaded cars, including loaded coal cars, which, as he is informed and believes, came from a point outside the State, from the East Buffalo yards to the Black Rock yards, and was turning his engine around preparatory to

taking another train of cars from the Black Rock yards to the East Buffalo yards, included in which latter train of cars, as deponent is informed and verily believes, were cars which had come from Canada, and that by reason of the foregoing deponent alleges that both he and the defendant at the time of the accident were engaged in interstate commerce, and deponent further alleges that the Federal Employers' Liability Act took effect a short time before his accident, that a similar previous Act had been declared unconstitutional by the United States Supreme Court, and that at the time of the commencement of this action it was not known whether the Second Employers' Liability Act would be sustained; that its scope and application had not been settled by the decisions of the courts, and it had not then been determined just what acts constituted interstate commerce, especially in relation to train movements and indiscriminate switching operation; that recently, as deponent is informed and verily believes, the Federal Courts have decided that persons engaged as plaintiff was at the time of his accident are engaged in interstate commerce, and believes that he cannot safely proceed to trial without amending his complaint and setting up the fact that he was engaged in interstate commerce at the time of his accident, because he is advised by his counsel, and verily believes, that should it appear upon the trial that he was so engaged, the courts would be obliged to decline jurisdiction under the State law, and deponent would not be in a position to urge the application of the Federal law."

It will be observed that Mr. Kinney's affidavit sets up facts not at all set forth in the original complaint, and entirely inconsistent therewith.

The decision of the Court of Appeals in Kinney vs. N. Y. C. & H. R. R. R. Co., 217 N. Y., 325, *fol-*

lowing the third trial of this case, left the plaintiff with little if any hope of recovery at common law or under the State Employers' Liability Act.

Chief Justice Hiscock, writing for the court, said page 330:

> "If the duty had rested solely upon plaintiff of reading the signal, I think the escape of steam would not have excused him and that he would have been guilty of negligence as matter of law, and for this reason I do not think the negligence of the defendant in furnishing a leaky engine, which I have assumed became a material element in the disposition of the case." (Streets vs. Grand Trunk Ry. Co., 76 App. Div. 480; Affd. 178 N. Y. 553).

Mr. Justice Hiscock, then discusses the plaintiff's claim of negligence on the part of Mullen saying in conclusion at page 332:

> "If he read the signal incorrectly or gave plaintiff the wrong signal, as is in effect claimed then we have a case of negligence on the part of a co-employee which has not been changed by the statute and which is not chargeable to the employer but is a bar to the right to recover."

Plaintiff's reason for turning to the Federal statute for relief must be very obvious to this court. His rights under the State and Federal statute were materially different. Under the Federal act plaintiff's negligence was not necessarily a bar to his recovery, and the negligence of Mullen, if any, was the negligence of the defendant, and not of a co-employee. Under the State statute either was a bar to his recovery.

Plaintiff's counsel admitted in the Appellate Division, that the right of plaintiff under the two statutes was materially different and that under the Federal statute different and additional elements of negligence were chargeable to the defendant.

Mr. Ward said in his brief in the Appellate Division below, page 35:

> "Furthermore under the Federal act, *additional elements of negligence can be charged to the defendant.* The negligence of Mullen so much stressed by the defendant in the earlier trials, and because of which Justice Emery set aside the first verdict and the Court of Appeals set aside the third verdict, is now the negligence of the defendant." (Italics ours).

and at page 14:

> "Since the trial of the action under the Federal act the question of the plaintiff's contributory negligence is no longer determinative of his right to recover."

The object of the plaintiff in departing from the laws of the state under which he had been defeated after eight years of litigation, to those of the United States, is therefore very apparent.

The amended complaint differs from the original complaint, in that it increases the demand for damages from $30,000 to $50,000 and alleges (Fol. 49):

> "AND PLAINTIFF FURTHER ALLEGES upon information and belief, that both the plaintiff and the defendant, at the times, and in the manner above set forth, were then and there engaged in interstate commerce, and were subject to the provisions

of an Act of Commerce known as the Federal Employers' Liability Act, which took effect in April, 1908."

If plaintiff was engaged in interstate commerce, then his original complaint failed to state any cause of action under the State Act, the Federal Employers' Liability Act being exclusive and superseding all State laws upon the same subject. By coming into court and alleging that the plaintiff was engaged in interstate commerce, the plaintiff admits that the action as brought and three times tried could not be maintained. It is not merely the addition of further grounds of liability. It is even more than a substitution of one cause of action for another. It is the substitution of the right to maintain an action barred by the express limitations of the Federal Statute, in place of a cause of action in which plaintiff has been defeated after eight years of litigation.

Assume that by final judgment the plaintiff had been defeated in his action under the State Act, could he then, eight years after the accident successfully institute and maintain suit under the Federal Statute? The question answers itself. Yet that is precisely what has been accomplished here under the guise of an amendment.

The original and amended complaint are vitally different. The amendment was not a mere amplification of the original pleading. It is not a difference of form but of substance. The original complaint by its plain language excluded all suggestion of right under the Federal statute. The amended complaint excludes all rights under the

State statute. The cause of action originally pleaded was wholly inconsistent with the cause of action set forth in the amended complaint. Each excludes the other.

Under the facts here disclosed the plaintiff was, by the amendment permitted to substitute a new and distinct cause of action, in place of a cause of action asserted by him for eight years and abandoned only when the Court of Appeals had plainly indicated that a recovery could not be had thereunder. There was not only a departure from fact to fact, but from law to law.

Congress certainly meant something when it enacted Section 6 of the Federal Employers' Liability Act. Its meaning seems clear and unambiguous, yet if this judgment can stand we frankly admit that we fail to appreciate the meaning or purpose of the statute.

We respectfully urge that if the plaintiff was engaged in interstate, that this judgment for the reasons assigned is erroneous and should be brought to this court for correction and reversal.

The defendant having set up in its answer the Statute of Limitations, the burden of showing that the statute had not run was on the plaintiff.

Mason vs. Henry, 152 N. Y. 529.
Baker vs. Duff, 136 A. D. 13.

Authorities relied on by petitioner.

In *Union Pacific Railway Co. v. Wyler*, 158 U. S. 285, an action was brought by the plaintiff against the defendant based upon the general law of master and servant to recover damages for an

injury, which happened to the plaintiff in Kansas. This petition was filed in the State Court of Missouri September 25th, 1885, two years and five months after the injury. Action for damages for personal injury not arising from contract was barred by the general laws of Kansas after a period of two years. On October 30th, 1888, the first amended petition was filed by plaintiff and on November 2nd, 1888, a second amended petition was filed, which set up a cause of action against the defendant under and by virtue of Chapter 93 of the laws of Kansas of 1874. At least five years and six months had intervened between the date of the accident and the filing of the second petition. The statute law of Missouri bars actions on account of personal injury in five years. The question of the operation of the statutes of limitation of both the States of Kansas and Missouri was involved, and, after stating that it was an elementary rule that limitations were governed by the law of the forum and not by the law of the place where the event happened, the court proceeded to the determination of the question as to whether the cause of action was barred by the five year limitation of law of the Missouri statute. The claim was that the second amended petition imposed an entirely new and distinct cause of action. Mr. Justice White in writing the opinion of this court said at pages 289-290:

> "Before considering the limitation which it is asserted results from the Kansas statute, we will determine whether the actions is barred by the law of Missouri, because if so, it will be unnecessary to decide whether the Kansas statute has an extra-territorial effect. The decisions as to the application of the Missouri law involves, first, the ascertainment of

whether the amended petition presented a new cause of action. The legal principles by which this question must be solved are those which belong to the law of departure, since the rules which govern this subject afford the true criterion by which to determine the question whether there is a new cause of action in case of an amendment. In many of the states which have adopted the Code System great latitude has been allowed in regard to amendment; but even in those states it is held that the question of what constitutes a departure in an amended pleading is nevertheless to be determined by the rules of common law, which thus furnish the test for ascertaining whether a given amendment presents a new cause of action even although it be permissible to advance such new cause, by way of an amendment."

After quoting from many authors and decisions as to what constitutes a departure, the learned jurist continues at page 296:

"The most common, if not the invariable, test of departure in law, as settled by the authorities referred to, is a change from the assertion of a cause of action under the common or general law to a reliance upon a statute giving a particular or exceptional right. * * * * The English courts, from which our doctrine upon this subject is derived, necessarily take judicial notice of acts of Parliament, yet there a departure is made and a new cause of action is asserted when a party who has at first relied upon the common law afterwards rests his claim to recovery upon a statute.

The amended petition, which averred the statute of Kansas, having asserted a new cause of action, the next question is, was recovery under this petition barred by the Missouri statute of limitations? The general rule is, that an amendment relates back to the time

of the filing of the original petition, so that the running of the statute of limitations against the amendment is arrested thereby. But this rule, from its very reason, applies only to an amendment which does not create a new cause of action. The principle is, that, as the running of the statute is interrupted, by the suit and summons, so far as the cause of action then propounded is concerned, it interrupts as to all matters, subsequently alleged, by way of amendment, which are part thereof. But where the cause of action relied upon, in an amendment, is different from that originally asserted, the reason of the rule ceases to exist, and hence the rule itself no longer applies."

The Wyler case, we believe, is an absolute authority for our contention that the departure from the state statute to the Federal statute set up an entirely new and distinct cause of action, and this case is also an authority for our contention that the amendment does not and cannot relate back to the time of the filing of the original complaint, so as to avoid the bar, the statute of limitations contained in the Federal Employers' Liability Act.

In Seaboard Air Line Railway v. Renn, 241 U. S. 290, *the original complaint stated a cause of action, although perhaps imperfectly, under the Federal statute.* The defendant upon the trial of action sought some advantage from this fact and the Trial Court over the defendant's objection permitted the complaint to be so amended as to state distinctly the defendant's engagement and the plaintiff's employment in interstate commerce. This court held that the original complaint sufficiently stated a case under the Federal act without

amendment. The court, however, said at pages 293-294:

> "If the amendment merely expanded or amplified what was alleged in support of the cause of action already asserted it related back to the commencement of the action and was not affected by the intervening lapse of time. Texas and Pacific Ry. v. Cox, 145 U. S. 593, 603-604; Atlantic and Pacific R. R. v. Laird, 164 U. S. 393; Hutchinson v. Otis, 190 U. S. 552, 555; Missouri, Kansas & Texas Ry. v. Wulf, 226 U. S. 570, 576; Crotty v. Chicago Great Western Ry., 95 C. C. A. 91; S. C. 169 Fed. Rep. 593. But if it introduced a new or different cause of action, it was the equivalent of a new suit, as to which the running of the limitation was not theretofore arrested. Sicard v. Davis, 6 Pet. 124, 140; Union Pacific Ry. v. Wyler, 158 U. S. 285; United States v. Dalcour, 203 U. S. 408, 423. * * * * * *
>
> In these circumstances, while the question is not free from difficulty, we cannot say that the court erred in treating the original complaint as pointing, although only imperfectly to a cause of action under the law of Congress. And this being so, it must be taken that the amendment merely expanded or amplified what was alleged in support of that cause of action and related back to the commencement of the suit, which was before the limitation had expired."

In *Troxell v. D. L. & W. R. R. Co.*, 227 U. S. 334, this court clearly indicated that an action brought under the Federal Act sets up a different cause of action than an action under the Pennsylvania statute. The particular question here involved was not raised in that case for the reason that the second action was brought under the Federal statute within two years after the cause of action accrued.

In *Atlantic Coast Line R. R. v. Burnette*, 239 U. S. 199, it was distinctly held that even though the statute of limitations was not pleaded the defendant could take advantage of the fact that the action was brought too late. The court said at page 200:

> "It would seem a miscarriage of justice if the plaintiff should recover upon a statute that did not govern the case, in a suit that the same act declared too late to be maintained.
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> * * * * * *
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> The record shows a case to which the Act of 1908 did not apply.
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> * * * * * *
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> It also shows that the action was brought too late, and that the defendant insisted upon that point, although it had not pleaded what was apparent on the allegations of the declaration and the admissions of the answer".

In *Amer. R. R. of Porto Rico v. Didricksen*, 227 U. S. 145, this court said at page 149:

> "The cause of action which was created in behalf of the injured employe did not survive his death nor pass to his representatives, but the Act, in case of the death of such an employe from his injury, creates a new and distinct right of action for the benefit of the dependent relatives named in the statute."

The same ruling was adhered to in *Gulf, Colorado, etc. Ry. Co. v. McGinnis*, 228 U. S. 173, 175.

In *Hogarty v. Phila. & R. Ry. Co.*, 255 Pa. 236, the plaintiff brought a common law action to which the defendant had interposed a defense. Four years after the accident he was permitted to amend his complaint setting up the Federal Act.

The court said, page 241:

"As the Act of Congress, and not the common law, gave the plaintiff a right to recover, his pleadings ought to have shown that his case was within the Federal statute, and proof of this was a material part of it."

And at pages 244-245:

"While a plaintiff, pleading only a common law right of action against a railroad company, may not invoke the Federal Employers' Liability Act, the company, in its defense, may, of course, rely upon the Act of Congress, if it can show, or the testimony offered by the plaintiff shows, that it was engaged in interstate commerce at the time the plaintiff was injured; St. Louis, Iron Mountain & Southern Ry. Company v. Hesterly, 228 U. S. 702; North Carolina Ry. Company v. Zachary, 232 U. S. 248; Toledo, St. Louis & Western Railroad Company vs. Slavin, 236 U. S. 454.

In the case at bar, as already observed, plaintiff's original statement showed nothing but a mere common law right of action against the defendant. By it the railroad company was notified to come into court and defend against a common law charge of negligence. Nothing within its four corners even hinted that plaintiff had undertaken to hold it liable under the Act of Congress which had given him a cause of action. In view of his receipt of benefits, he had no common law right of action, and so the record stood until more than four years had elapsed from the time he had acquired a cause of action against it under the Federal statute; but that statute provides that no action shall be maintained under it 'unless commenced within two years from the day the cause of action accrued;' and we now come to the consideration of the second question, of which little need be said, as we regard it as settled by a ruling of the

Supreme Court of the United States, announced since we heard this appeal."

And later in its opinion the court, in referring to the Renn case, *supra*, said, page 247:

"It clearly appears from this last utterance of the Supreme Court of the United States that if Renn's original complaint had averred merely a common law right of action against the railway company, with nothing in it indicating that the employer was operating a line of railroad from one state into another, the amendment would have been improperly allowed, for the reason that it introduced a new cause of action under the Federal Employers' Liability Act, which had been barred by the express terms of that act after two years from the time of the accident."

In *Allen v. Tuscarora Valley R. R. Co.*, 229 Pa. 97, 30 L. R. A. (N. S.) 1096, 1100-1101, a cause of action was brought at common law to recover damages for injuries alleged to have been sustained by the plaintiff through defendant's failure to equip its cars in ordinary use and plaintiff, to obviate the defense of assumed risk, asserted against his cause of action, sought leave to amend his complaint, so as to allege a cause of action under the Federal Safety Appliance Act. To this proposed amendment defendant objected upon the ground that it would introduce a new and different cause of action against which a bar of the statute of limitations had already run. In reversing the allowance of the proposed amendment by the court below, the Supreme Court of the State of Pennsylvania said, page 101:

"The Act of Congress is the basis of the plaintiff's claim, as laid in the amended statement; while, in the original statement, the

basis of the claim is the failure of the carrier to perform its common law duty to him as its employee. The amendment is not a restatement or the statement in a different form, of the same cause of action, but the averment, of a statutory cause of action in which the liability is different and greater than in an action at common law. It deprives the defendant of a valuable right, viz., the defense of the assumption of risk by the plaintiff, which is not permissible: * * * * * * We think it clear that the amendment to the statement of claim introduced a new and different cause of action, which was barred by the statute of limitations, and, therefore, under the well-settled rule in this state, it should not have been allowed."

And at page 102:

"The original statement, it is true, averred the injuries of the plaintiff and the alleged negligent act of the defendant by which they were caused, but there was no intimation in the statement that the carrier was engaged in interstate commerce, or that the defendant's cars were equipped with couplers in violation of the Act of Congress. Proof of the existence of these two additional facts was required to sustain the action as amended, and this is one of the tests in determining whether the amendment introduces a different cause of action. * * * * *

It is also true that if, as claimed by the plaintiff, all the facts necessary to sustain a recovery on the amended statement were set forth in the original statement, the amendment would still be a change or departure from the original statement, not from fact to fact, but from law to law, from an action founded on the common law to one founded on a statute abrogating the common law, which is equally effective to prevent an allowance of the amendment. In such case the

plaintiff bases his right of recovery upon other and different law, instead of other and different facts, and it constitutes a departure from the original cause of action; Union Pacific Ry. Co. v. Wyler, 158 U. S. 285; Boston & Maine R. R. Co. v. Hurd, 108 Fed. Repr. 116."

In *Hall v. Louisville & N. R. R. Co.*, 157 Fed. 464, the plaintiff who had brought an action under the statute of the State of Florida, sought to amend her complaint so as to set forth a cause of action under the first Federal Employers' Liability Act of 1906. The statutory limitation of one year, described by the act, had expired.

The Circuit Court of the United States for the Northern District of Florida said, page 466:

"Does the amendment relate back to the time of the bringing of the suit, so as to prevent the application of the statute to the case at bar? Such statutes are statutes of quiet, and are recognized by all courts in cases where they apply, as a valid, substantial and legal defense. The question of 'relation back' of amendments is a fiction of the law, and should never be allowed, when to do so would to the prejudice of a litigant deprive him of a substantial legal right. The defendant, against whom any party has a right of action, has a right to presume that such party has abandoned that right in cases where he has failed to assert it within the time prescribed by law."

In *Hughes v. N. Y. O. & W. R. R. Co.*, 158 App. Div. 443, the accident occurred in Pennsylvania and the action was brought under the Employers' Liability Act of that state. The employee was in-

jured April 21st, 1910 and the action brought on January 13th, 1911. Plaintiff died and his administrators in February, 1913, were substituted, and served an amended complaint setting up the Federal Employers' Liability Act. It was held that the cause of action, though introduced by the amendment, was barred by the two years statute.

The court said at page 444:

> "The action was not brought under that act, but is specifically based on the common law as modified by the statute of the state. An action under the Federal law must be begun within two years from the time the cause of action accrued (35 U. S. Stat. at Large 66, §6, as amd. by 36 id. 291, §1), but after nearly three years it is sought to convert the action under a State law into an action under the Federal law, thus extending the statute by a substituted cause of action. On April 5, 1910, the Federal act was amended so as to provide 'That any right of action given by this act to a person suffering injury shall survive,' etc. (35 U. S. Stat. at Large, 66 §9, added by 36 id. 291, §2). But the right cannot survive the time limited for its exercise, and when the person to whom the right is initially given elects to proceed under the law of the state, the right to proceed under the Federal statute is at least dormant, and ceases after the expiration of the two years. The Federal statute is tendered to him who, entitled, chooses to employ it. He may prefer the law of the state, as the injured person did in the present instance. But such law cannot be exploited and, upon emergency, the action be changed into one under the Federal law. There is not a suggestion of fact in the original complaint indicating intention to avail of the Federal statute."

See also *Carpenter vs. Cent. Ver. R. Co.*, 107 Atl. 569 (July 3, 1919).

In *Ryan, as Admrx. v. N. Y. C. & H. R. R. Co.*, 171 App. Div., 958, 971, plaintiff's intestate met with an accident June 30th, 1910, which resulted in his death. He was at the time of the accident employed by the defendant as a yard conductor at defendant's depot yards in the City of Albany. Letters of administration were issued to plaintiff November 29th, 1910, and on January 27th, 1911, she caused to be served on the defendant a notice under Section 201 of the Labor Law. The action was started March 7th, 1911, and on March 28th, 1911, issue was joined. The action was brought to trial in April, 1915. In the course of the trial a witness for the plaintiff, in answer to a question put to him on direct examination, stated that the train was to go to Boston, whereupon defendant's counsel moved to strike out the answer as calculated to bring the case within the provisions of the Federal Act, whereas the complaint contained no allegations that when intestate met his death he was employed by the defendant in, or that the defendant was then engaged in interstate commerce. Plaintiff's attorney then made a motion to amend the complaint so as to allege interstate commerce. The motion was denied and the answer was stricken out on motion of defendant's counsel. Plaintiff again renewed the motion and the same was again denied. A juror was then withdrawn and a motion to amend made at Special Term, which was denied by Mr. Justice Chester. An appeal was taken to the Appellate Division, Third Department, where the order was affirmed.

In Kinney v. N. Y. C. & H. R. R. Co., 166 N. Y. S. 868, the question as to whether the statute of limitations of two years was a bar to the cause of action set up in the amended complaint in this action was squarely passed upon. Mr. Justice Wheeler said:

> "We, therefore, have presented the question whether the statute of limitations of two years prescribed by §6 of the Federal Act, applies to this case. If it does then it would be idle to grant a new trial, for no recovery could be ultimately upheld. We think the case of Seaboard Air Line Railway v. Renn, 241 U. S., 290, is decisive of the question here presented. In the case cited the Trial Court permitted an amendment to the complaint so as to state distinctly an employment in interstate commerce at the time of the accident.
>
> The defendant's counsel objected to the amendment in that the original complaint did not state a cause of action under the act of Congress; that with the amendment the complaint would state a new cause of action under that act, and that, as more than two years had elapsed since the right of action accrued, the amendment could not be made the medium of introducing this new cause of action consistently with the provision in §6 of the act.
>
> The plaintiff recovered, and the railway company carried the case to the Supreme Court of the United States on the question raised. The Supreme Court held that in the particular case before it, the original complaint sufficiently stated a case under the Federal Act without amendment The court, however, said: 'If the amendment merely expanded or amplified what was alleged in support of the cause of action already asserted, it related back to the commencement, and was not affected by the intervening lapse of time. (Texas & Pacific Ry. v. Cox, 145 U. S. 593, 603-604; Atlantic & Pacific R. R. Co. v.

Leard, 164 U. S. 393; Hutchinson v. Otis, 190 U. S., 552, 555; Missouri, Kansas & Texas Ry. v. Wulf, 226 U. S. 570, 576; Crotty v. Chicago Great Western Ry., 95 C. C. A. 91; s. c. 169 Fed. Rep. 595). But if it introduced a new or different cause of action, it was the equivalent of a new suit, as to which the running of the limitation was not therefore arrested. (Secord v. Davis, 6 Pet., 124, 140; Union Pacific Ry. v. Wyler, 158 U. S. 285; United States v. Dalcour, 203 U. S. 408-423).'

The opinion then proceeds to show the amendment allowed did not violate the rules above enunciated, because the original complaint set forth sufficient facts to bring the case under the Federal Act, and the amendment allowed simply amounted to an amplification of what had already been alleged.

It goes without saying that had the original complaint failed to state facts sufficient to bring the action under the law of congress, the two year limitation would have applied. The Federal Act wherever it applies, is exclusive of all other remedies. If the case comes under the Federal Act, a recovery must be had under the provisions of that act, or not at all."

St Louis, San Francisco & Texas R. Co. v. Seale, 229 U. S. 156.

Taylor v. Taylor, 232 U. S. 363.

When, therefore, the jury found that the plaintiff in this action was engaged in interstate commerce at the time of the accident, we are unable to discover how the plaintiff can expect to sustain any verdict which he might obtain, for the reason that more than two years had expired before his complaint was amended setting forth facts bringing his case under the Federal Act, which was tantamount to setting forth a new cause of action.

It should be noted that the special verdict of the jury is in accordance with the allegations of the plaintiff's complaint, and of his

own contentions. I am not unmindful of the fact the Special Term of this court permitted the amendment in question over the objection of the defendant, and that on an appeal from the order allowing the amendment, the Appellate Division affirmed the order.

The plaintiff's counsel may contend that these adjudications are controlling. We are not aware whether the case of Seaboard Air Line Railway v. Renn, 241 U. S. 290, was specifically called to the attention of the court. *Nevertheless, it is sufficient to say that the statute of limitations is a matter of defense, to be pled and proved, and unless so pled and proved by the defendant, cannot be availed of as matter of defense. So we think the Special Term properly permitted the amendment setting up the fact that the plaintiff was, at the time of the accident, engaged in interstate commerce, leaving it for the defendant to plead the two years limitation prescribed by the statute.*" (Italics ours).

The defendant as before pointed out, did plead and prove the statute of Limitations.

In Findley vs. Coal & Coke Ry. Co., 87 S. E. 198, there was before the court the question of an amendment setting up a cause of action under the Federal statute. The court after pointing out the distinction between the state statute and the Federal Act, said, page 201:

"Obviously, therefore, the duty of the master under the state law, though similar in some respects to that imposed on him by the Federal Act is not identical therewith, or is the right of the servant the same under the two acts. Moreover, facts applying the Federal statute exclude the operation of the state statute as effectually as if it were nonexistent. It does not constitute the basis or

ground of the action at all. St. L. & San Francisco Ry. Co. vs. Seale, 229 U. S. 153. * * * Second Employers' Cases, 233 U. S. 1. * * * Mich. Cent. Ry. vs. Vrieland, 227 U. S. 59, * * *"

"If the duty violated or broken were contractual in its nature, the contract would certainly have to be pleaded and there could be no recovery upon proof of a contract different from the one declared upon. Two wholly unconnected statutes imposing duties of different natures can no more constitute the basis of a single right of action than two unrelated contracts."

"The contracts came on by pleading and the statute by judicial cognizance. This merely formal difference cannot vary the principle applicable to the substantive rights On this subject Mr. Justice White, now Chief Justice, delivering the opinion of the court in Union Pacific Railway Co. v. Wyler, 158 U. S. 285, * * * * * said:

'As the first petition proceeded under the general law of master and servant, and the second petition asserted a right to recover in derogation of that law, in consequence of the Kansas statute, it was a departure from law to law'.

Accordingly it was held in that case that the second petition stated a new cause of action. In Missouri, Kansas & Texas Ry. Co. v. Wulf, 226 U. S. 570. * * * a petition stating facts bringing the case within the Federal statute was amended only as to the capacity in which the plaintiff sued. By her first petition, she had sued in her individual capacity. By the second, she sued as personal representative. '*In all other material respects the second petition was identical with the first.* The court held the amended petition did not state a new cause of action. In this case the declaration as originally prepared and filed and as it was when the first trial was had disclosed no fact that in any

way suggested the plaintiff's decedent had been killed while engaged in interstate commerce. *The amended count introduced facts which it is claimed, made the case one within the Federal statute. If they did, the amendment, according to the ruling in Union Pacific Ity. Co. v. Wyler, introduced a new cause of action.*" (Italics ours).

In Ft. Worth & R. G. Ry. Co. v. Bird, 196 S. W., 597, the deceased was killed October 11, 1911. The suit was originally instituted March 21, 1913, the plaintiff suing in her individual capacity. The original petition did not state a cause of action under the Federal Employers' Liability Act, the only expressions at all suggesting the interstate feature being the allegations of the character of the deceased's employment and that the Ft. Worth & Rio Grande Railway Company, incorporated under the laws of the State of Texas, constituted a part of the system of railway lines known and designated as the St. Louis San Francisco Railway Company of Texas, and also known as the Frisco system. On April 17, 1915 plaintiff filed an amended petition asserting her right to recover as administratrix *and also that at the time of the accident both the deceased and the railway company were engaged in interstate commerce.*

The court said, page 598:

"The irresistible conclusion, as it seems to us, to be drawn from the pleading of the plaintiff filed prior to her amendment of April 17, 1915, is that her action was brought under the Texas Statute (Revised statutes 1911, art. 4694) as it existed and was construed prior to the amendment by act ap-

proved April 7, 1913 (Gen. Laws 1913, p. 288). If, therefore the amended petition of the plaintiff filed April 17, 1915, amounted to an abandonment of her original cause of action, and to the setting up of a new and distinct cause or right of recovery it is clear that the defendant's plea of limitation was well taken. For in such case, under the Federal Employers' Liability Act, the plaintiff's cause was barred two years from the death of the deceased which was as alleged and shown on October 11, 1913."

The court then cites and quotes from Union Pacific Ry. Co. v. Wyler, and other cases and continues page 599:

"A consideration of the cases cited constrains us to hold that the amended pleading of the appellee filed in this case on April 17, 1915, set up a new cause of action which was barred by the two-year statute of limitation, not only, as stated by the Federal Employers' Liability Act, but also under the Texas Statute on the subject. Considering the plaintiff's original petition, and all amendments prior to the one upon which the trial proceeded, it seems evident that the plaintiff sought to maintain her action under the Texas Statute as it existed prior to the amendment of 1913," and after referring to the pleadings the court continues page 599.

"This allegation makes it evident that the pleader in framing the original pleadings, did not rely upon or have in mind a resort to the Federal Employers' Liability Act. Unquestionably therefore, both by the test as given by our own Supreme Court, and by the rule as applied and illustrated by the Supreme Court of the United States in the decision that we have cited, the plaintiff's amended petition upon which the recovery was had set up a new cause of action." (Italics ours).

The court after pointing out the differences between the Texas Statutes and the Federal Employers' Liability Act continues at page 600.

> "It thus clearly appears that the amended pleadings and the previous pleadings were not subject to the same defenses and that there was a clear departure of pleading from the different laws of one Sovereignty, the State, to those of another, the United States."

In Walker vs. Iowa Cent. Ry. Co. 241 Fed. 395, the case was commenced in the State Court of Iowa and was removed by the defendant to the United States Circuit Court. The injury occurred December 8th, 1908. The case was tried and resulted in a verdict for the plaintiff in May, 1912. The defendant took the case to the Circuit Court of Appeals where the judgment was reversed for error in the instructions February 26, 1913. The plaintiff filed a petition for a rehearing in the Circuit Court of Appeals in which for the first time the question was raised that the cause of action was under the Federal Employers' Liability Act. The petition was overruled May 15, 1913. The petition for Certiorari was denied by the United States Supreme Court October 26, 1913. On November 27, 1914, the plaintiff with leave of court filed an amendment to the original petition, in which for the first time he sought to recover under the Federal Act. The defendant demurred, on the grounds that the cause of action set forth in the amended petition was barred both by the two-year limitation of the Federal Act and the Statute of Limitation of the State of Iowa. Reed, District Judge after discussing the allegations of the original pleadings

and that the same did not allege or show facts bringing the case within the Federal Act and also that the case was not tried on that theory and distinguishing the case from M. K. & T. Co. vs. Wulf, 226 U. S. 570, and other similar cases said, page 400:

> "There seems to be no escape from the conclusion that, if the two year limitation prescribed by the Employers' Liability Act, in which actions to recover thereunder must be brought, has any force, the cause of action alleged in this amendment was barred when the amendment of November 27, 1914, was filed and cannot be maintained." Citing cases.

The demurrer was sustained and later a motion for a rehearing was made and denied.

In Roberts Federal Liability of Carriers, the author says at §696, pages 1210-1212:

> "It is provided in Section 6 of the Employers' Liability Act that no action shall be maintained under the statute unless commenced within two years from the day the cause of action accrued. All actions, therefore, for injuries or deaths arising in interstate commerce must be instituted within two years from the day the cause of action accrued. To this extent there has been no diversity of opinion among the courts or much difficulty in the application to concrete facts. But when a suit is instituted for personal injuries or death of an employe within the time limited by the Statute and the plaintiff, after the lapse of two years, amends his petition or complaint, the commencement of the suit within the two years does not prevent the running of the Statute of Limitation against such an amendment if the amended petition or declaration introduces a new or different cause of action from that stated in the original complaint; for, while a new cause of action may be introduced by amendment, the established limitation on the operation of

its relation to the commencement of the suit is, that if the amendment introduces new matter or a different cause of action not with the *lis pendens* as to which the Statute has operated as a bar at the time of making the amendment, it is as available as if the amendment were a new and independent suit. A cause of action created by the Federal Act is separate and distinct from a cause of action created by the law of a state or arising under the common law. Two wholly unconnected statutes imposing duties of different natures can no more constitute the basis of a single right of action than two unrelated contracts. It therefore follows that an amendment to a petition predicating liability solely upon the common law or upon the statute of a state, cannot be amended after the two year period of limitation so as to state facts constituting a cause of action under the federal act if proper and seasonable objection is made thereto."

The defense of the Statute of Limitations in the Federal Act has been generally held to constitute a complete bar to the action except in cases when the original pleadings stated facts which alleged a cause of action under the Federal Act.

Here plaintiff has done the very thing that was condemned in the *Hughes case Supra.* He turns to the Federal Statute in an emergency and seeks to change the action into one under that Statute.

The Trial Court erred in submitting the question of interstate commerce to the jury over the objection and exception of the defendant (Fol. 3356) and in refusing to instruct the jury as requested at folio 3349, to which exception was taken (Fol. 3350) the defendant's motion for a nonsuit (Fol. 1417) should have been granted.

Distinguishing Cases Cited by Respondent in the Court Below.

The cases cited by respondent in the court below as sustaining his contention that the cause of action under the Federal Employers' Liability Act is not barred by the statute of limitations, are all distinguishable from the case at bar.

In the case of *St. Louis, San Francisco & Texas Ry. Co. v. Maude Smith, as admrx., etc.*, 243 U. S. 630 (formerly Seale) cited by the plaintiff, the Court of Civil Appeals of Texas said, 171 S. W., page 513:

> "The allegations in the last amendment, and to which the exceptions were leveled, are substantially, in fact almost literally the same as those in the second amendment, except in the last the widow of the deceased, M. T. Seale, having married again, and having been appointed administratrix of his estate, by leave of the court, as such representative made herself a party plaintiff in lieu of the original plaintiff. The last amendment did not set up a new cause of action under the provisions of the Federal Employers' Liability Act any more than did the second amendment. On the first appeal the case was affirmed but on writ of error to the Supreme Court of the United States it was reversed, because plaintiff was not capable of recovering in her individual capacity, 'but only through the deceased's personal representative.' Ry. Co. v. Maude Seale, 229 U. S. 156, 33 Sup. Ct. 651, 57 L Ed. 1129, Ann. Cas. 1914C, 156.
>
> The substitution of the personal representative of a deceased party is not the beginning of a new cause of action, but it relates back to the filing of the original petition.
>
> We think the case of Railway Co v. Wulf, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. 355,

Ann. Cas. 1914B, 134 is decisive of this proposition."

This opinion was written after the reversal by this court of the case of *St. Louis, San Francisco & Texas Ry. Co. v. Seale*, 229 U. S., 156. When the case was first before this court the plaintiff had filed two amended petitions, both of which were filed within the two years. *Upon that trial it developed that the deceased and the defendant were engaged in interstate commerce at the time of the injury.* The Supreme Court held that the evidence admitted of no other view than that the case was one within the Federal statute and reversed and remanded the case "for further pro-"ceedings not inconsistent with this opinion *but "without prejudice to such rights as a personal "representative of the deceased may have."* As the case then stood, interstate commerce having been proven upon the trial, it was a mere question of substituting the personal representative in the place of the individual, under the ruling of this court in the *Wulf* case.

Not only had interstate commerce been proven under the second amended petition before the case first went to the Supreme Court of the United States, but it is to be noted from the opinion of the Court of Civil Appeals of Texas that the third amended petition was almost identical with the second amended petition. Under these circumstances the fact that the Supreme Court affirmed the judgment of the Texas Court of Civil Appeals is not surprising and does not in any wise indicate that the court passed upon or con-

sidered the particular question involved in the Kinney case.

In Illinois Central R. R. Co. vs. Lannis, 246 U. S. 652, the defendant insisted that the action be brought within and be governed by the Federal Employers' Liability Act. The original petition charged that the death of Lannis was caused by the negligence of the defendant and Timothy Carroll, its foreman. The defendant's answer, among other things, alleged that, in an action by the administratrix of Timothy Carroll against the same defendant because of said Carroll's death in the same accident, the United States District Court and the United States Circuit Court of Appeals had held that the liability of the defendant was to be measured by the Federal Employers' Liability Act, conferring the right of action upon the personal representative of the deceased, and filed a peremptory exception contending that the widow of Marshall Lannis had no cause of action in her individual capacity and that her suit should be dismissed. The exception was sustained.

The court said, page 5:

> "On trial of the exception it was maintained and on the authority of the decision of the United States Supreme Court in the case of Missouri, Kansas & Texas Railroad Co. vs. Wulf, 226 U. S. 570 * * * * the court recognized the plaintiff's right to qualify as administratrix of the succession of her deceased husband and to amend her petition by appearing as the personal representative of the deceased, within the time specified in the judgment maintaining the defendant's exception.

The plaintiff then qualified as administratrix of the succession of her husband and filed a supplemental and amended petition in her capacity as administratrix and personal representative of her deceased husband, for the benefit of herself and his only surviving child, a daughter of full age of majority. She repeated the allegations of her original petition as to her cause of action substantially as follows."

The court, after stating that it was not called upon to review the ruling that Lannis and the defendant were engaged in interstate commerce at the time of the accident, said, page 9:

"The plaintiff acquiesced in the ruling and does not question its correctness; and, as the ruling was made at the instance of the defendant's counsel, in behalf of the defendant, the latter is not in a position to dispute its correctness. See Wabash Railroad Co. v. Hayes, 234 U. S. 90, 34 Sup. Ct. 729, 58 L. Ed. 1230.

(1) The defendant's counsel insist upon the plea or exception that the supplemental petition changed the issues and set forth a new cause of action and that, therefore, it should not have been allowed. They contend that the cause of action set forth in the supplemental petition by the administratrix as personal representative of the deceased and for the benefit of his widow and daughter, under the Federal Employers' Liability Act, was entirely different from the cause of action alleged in the original petition by the widow in her individual capacity for her personal benefit, under the state statute.

We do not understand the contention to be that the statute or law under authority of which an action is brought is the cause of action. The argument is that the action commenced by the filing of the supplemental petition was a new and original action, not so

much because it was instituted under authority of another statute than that under which the suit was originally brought, as because the supplemental petition was filed by the personal representative of the deceased for the benefit of his widow and daughter, whereas the original petition was filed by the widow in her individual capacity and for her benefit alone."

In the Lannis case, not only had the defendant pleaded interstate commerce in its answer, but the real objection to the amendment was the change from an individual capacity to a representative capacity by the plaintiff.

In *B. & O. R. R. Co. v. Smith,* 246 U. S. 653, the situation was identical with that presented in the Renn case. The Court of Appeals of Kentucky said (169 Ky. 611-612):

"The remaining question is the sufficiency of the plea of limitation to bar a recovery. The accident resulting in the injury complained of occurred in 1909 and in March, 1911, within two years thereafter, the appellee brought this suit to recover damages. In his petition he alleged that the defendant company operated passenger and freight trains over its line of road in the States of Maryland, Virginia, Pennsylvania and elsewhere, and that at the time he received the injury complained of he was employed by it as a telegraph operator.

* * * * * * * * * *

On the return of the case to the Trial Court the plaintiff filed an amended petition increasing the sum asked in damages, but not changing in any material way the nature of his cause of action as stated in his original petition. Thereupon the railroad company filed an answer, setting up that at the time

of the accident it was engaged in interstate commerce and the appellee was employed by it in such commerce, and pleaded and relied on the two year statute of limitation fixed in the Federal statute for the commencement of actions under the Employers' Liability Act.

* * * * * * * * * *

The *original petition which was filed within two years* from the date of the accident, although it did not show specifically that the suit was brought under the Federal Act, *set up, as we think, facts showing that the railroad company was engaged in interstate commerce and that the appellee was employed by it in such commerce; and so we think that the original petition stated sufficiently a cause of action under the Federal Act.*" (Italics ours.)

In *Curtice v. Chicago & N. W. R. Co.*, (38 S. C. R. 578, 247 U. S. 510), the answer of the defendant, among other things, set up facts showing that at the time of the injury the plaintiff and defendant were engaged in interstate commerce, and that the cause of action, if any existed, was under the Federal Act and not under the laws of the State of Wisconsin.

In the court below (162 Wis. 421) Kerwin, J., in commenting upon this fact, said at page 426:

> "There is another feature of this case which is worthy of notice. When the defendant answered the original complaint it set up the facts which were omitted in the plaintiff's defective complaint and necessary to perfect the cause of action under the Federal Act and which were afterwards set up by the plaintiff in the amendment complained of. The defendant was therefore in no way surprised or prejudiced by the amendment. Doubtless the case could have gone to trial

on the pleadings as originally framed and the complaint on the trial amended in accordance with the issues made by the pleadings as originally framed."

Upon the reargument of the case (166 Wis. 594), the Wisconsin court recognized the fact that this court in the *Renn* case had by implication established a different rule but indicated that they were bound to adhere to their original decision irrespective of the Renn decision saying, page 599:

> "There are other considerations, however, which make it unnecessary to consider the question now. This court from very early times has held the doctrine that a proposition once decided by this court in a case becomes *res adjudicata* and the law of the case in its subsequent stages both in the lower courts and in this court."

Here the defendant did not plead the Federal Act as a defense to the original complaint. After the lapse of eight years, when all records are destroyed by which plaintiff's amendment might be disproved, it certainly cannot be said that the defendant was not prejudiced by the amendment. The cases are not at all similar.

In *Gainsville Midland Ry. Co. v. Vandiver*, 141 Ga., 250, the railway company filed a plea in abatement, averring that it was engaged in commerce between the states at the time the plaintiff was alleged to have been injured, and that at the time of his alleged injury the plaintiff was an employe of the railroad company in the operation of its railroad conveying interstate freight and that the Federal Employers' Liability Act was the only act in force and that it superseded the Georgia statute.

The plaintiff and defendant then entered into the following stipulation of facts (page 351):

> "The train on which the plaintiff was working and firing the engine as fireman at the time of the alleged injury was pulling several solid freight cars from other states, loaded with freight from other states, which said defendant company had removed from connecting common carriers at Athens, Ga., for delivery at points in Georgia on the line of the defendant's railroad; and that said connecting carriers had brought said cars of freight in from other states and delivered same to the defendant company, the said defendant company having no line of its own extending out of the State of Georgia, but had physical connection with the Seaboard Air Line and the Central of Georgia, which lines do extend out of the State of Georgia into other adjacent states."

After this stipulation was made the plaintiff amended his petition by striking out the reference to the Georgia statutes and further amending by alleging facts showing interstate commerce over the objection of the defendant. The demurrer to the petition as amended was filed and overruled. It does not appear that the statute of limitations was pleaded as a defense to the amended petition but simply raised by the demurrer. The stipulation, however was fatal to defendant's contention even if this question had been urged.

In *Vickery v. New London N. R. Co.*, 87 Conn., 634, 89 Atlantic 277, the original pleadings had no reference to the Federal statute. The accident happened September 5th, 1909. In January, 1913, while the pleadings were in the condition above stated, the plaintiff asked leave to amend

his complaint by the addition of allegations showing that the defendants and the plaintiff were engaged in interstate commerce at the time of the injury. *The leave to amend was refused upon the ground that an allowance of the amendment would result in the bringing of a new cause of action and one which had been lost to the plaintiff by statutory limitation.* The defendants thereupon added to the two defenses already filed a third, in which they alleged interstate commerce. The allegations of this new defense were admitted. In this condition of the pleadings the case came to trial to the jury. The court refused to charge the jury, as requested by the defendants, that if it should find that at the time of the injury the Central of Vermont Railway was engaged in interstate commerce and plaintiff was employed by it in interstate commerce that the defendants were entitled to a verdict.

The court, after referring to the amendment by the defendant setting up interstate commerce and the admission of these facts by the plaintiff, said:

> "The admitted allegations of the third defense, however, brought the pertinent facts upon the record and supplied the absence of them in the complaint.
>
> * * * * * * * * * *
>
> Under its application the complaint, defective though it was for lack of allegation of material facts, had its defects in that respect cured and the missing allegations supplied by other subsequent averment by the defendants and admission by the plaintiff."

In *Jorgesen v. Grand Rapids, etc., R. Co.*, 189 Mich., 537, the original complaint stated a cause

of action under the Federal statute, the court saying, pages 539-540:

> "But the original declaration in this case averred that the defendant owned at the time of the injury and was operating a railway system extending through the States of Michigan and Indiana, and that the decedent was employed by it in the construction, repairing and maintaining of the roadbed of such railway. This amounted to an allegation that the defendant was engaged in interstate commerce and that the decedent was employed by it in such commerce."

In *Bird v. Ft. Worth & R. G. Co.*, 207 S. W., 518, the amendment was permitted after the appointment of an administratrix and the decision hinged largely upon the court's holding that the cause of action given by the Federal Employers' Liability Act in case of death did not accrue until the appointment of a personal representative of the deceased and that in the *Bird* case the administratrix filed her amended petition within two years from the date of her appointment.

In *Nashville C. & St. L. Ry. Co. v. Anderson*, 134 Tenn. 666, the court said, pages 675-676:

> "This plea of the railway company was filed seven months after the accident occurred. The declaration stated acts of negligence cognizable under the Federal Employers' Liability statute. The only point of the plea was that the suit was not brought in the name of the administrator. The suit was not barred at that time. The Georgia statute had been repealed as to employes in interstate service and the declaration stated a good cause of action under the Act of Congress, except that it failed to aver the interstate character of deceased's service. This was admit-

ted by the plea. The sole effect of the special plea referred to was to bar the prosecution of the suit in the name of the widow. This plea set out as a fact that deceased was employed in interstate commerce at the time of his death and challenged the suit in the name of the widow. The plea would not have been good unless such fact had been made to appear. Such fact having been admitted by the administrator and the railway company having obtained the benefit of this admission and having procured a reversal of the former judgment against it on the strength of the plea, it would be inadmissible at this time to hold that the interstate nature of deceased's employment was not sufficiently brought out in the pleadings prior to the running of the two year statute.

This court long ago announced the rule that matters of substance omitted from a declaration might be cured by a plea."

In *Ferguson v. B. R. & P. R. R. Co.*, 176 App. Div. 897, there was involved merely the question of the dismissal of the action for failure to prosecute and that the reason assigned in defense of the motion was that plaintiff's attorney was not sure whether the cause of action was one under the Federal statute or under the state statute.

In *Seaboard Air Line Ry. Co. v. Koennecke*, 239 U. S. 352, the trial court found from the evidence that the plaintiff was engaged in interstate commerce. No question of amendment was argued in this court. The Trial Court left it to counsel to say whether he was surprised by the amendment, and counsel not being willing to say so, although saying he was not prepared on the question of dependency, the court ordered the trial to

proceed. It was merely urged in this court as an error that the requirement was contrary to the fourteenth amendment.

In *Payne v. N. Y. S. & W. R. R. Co.*, 201 N. Y. 436, the exclusive character of the Federal act was not disclosed. It was assumed in the opinion that the two statutes were supplemental to the common law remedy and to each other. Since the Payne case was decided the main decisions of the Federal Court cited in our main brief held that the Federal Act does create a new and distinct cause of action.

In *Norton vs. Erie R. Co.*, 157 A. D. 899, the original complaint alleged that the defendant operated and owned a railway extending throughout the State of New York and other states, and that plaintiff's intestate was employed by it as a switchman.

Smith vs. Atlantic Coast Line R. Co., 210, Fed. Rep. 761, is the only case cited by plaintiff which seems to sustain his contention. This decision is in conflict with many, if not all of the authorities cited to sustain petitioner's contention, and has not been generally followed. Clearly it was overruled by the decision of this court in the *Renn* case.

It will be observed that all the other cases relied upon by plaintiff are cases where either the defendant in its answer set up interstate commerce and proved it upon the trial; where the original petitions stated a cause of action under

the Federal statute, or where the question of amendment was one solely of substitution of the personal representatives in place of the individual.

This case is distinguishable from all such decisions.

That an admission in the complaint can be cured by an allegation in the answer was specifically stated in *Texas & New Orleans R. R. Co. v. Miller*, 221 U. S. 408. The court said at page 416:

> "Of the ruling that the defect in the complaint was cured by the answers little need be said. While recognizing that the right created by the Louisiana statute was qualified by the one year limitation and that the Texas courts could not disregard the qualification without impinging upon the full faith and credit clause of the Constitution, we think the claim that they did disregard it is quite untenable. The action was begun within the time prescribed, and what the Texas courts really held was that the omission from the complaint of an essential allegation was cured by its inclusion in the answers. In so holding they but gave effect to a generally recognized rule upon the subject. United States v. Morris, 10 Wheat, 246, 286."

In the Kinney case for eight years there was not a suggestion of the application of the Federal Statute, and no facts were alleged either in the original complaint, or the original answer from which interstate commerce could be inferred. Upon none of the trials was there the slightest proof of Kinney's engagement in interstate commerce. Obviously, and admittedly there was no intention to invoke the Federal Act.

We respectfully submit that, in view of the conflict of decisions, and the apparent confusion as to the interpretation of the Renn case, this case is peculiarly one which this court should review, and that public interest requires its decision upon this important question.

POINT II.

The plaintiff failed to establish by any evidence that he was engaged in interstate commerce at the time of the accident. The court erred in refusing to instruct a verdict for the defendant under the Federal Act to which exception was duly taken (Fols. 3006, 3008, 1416), and erred in refusing to charge the jury that there was no evidence from which the jury could find that plaintiff was engaged in interstate commerce to which exception was duly taken (Fol. 3349).

This trial started January 27, 1919, more than 10 years after the accident occurred. Plaintiff attempted to prove that the "Fence track" from which Kinney was eventually going to get some cars, was on October 12, 1908, used exclusively for interstate cars, cars coming from or going to Canada.

Shultis, a witness sworn by plaintiff merely testified that the cars he from time to time took off this track had either come from or were going to Canada. He admitted that he had no knowledge as to the character of the cars on the "Fence" track the night Kinney was injured. (Fols. 172-173).

Sometimes he would not be in this yard for two or three days. (Fols. 148-151). He admitted that he could not tell whether this track was used for any other purpose than interchange between the Michigan Central and the New York Central (Fols. 149, 150) and he also admitted that it might have been used for other purposes. (Fols. 175-177). He admitted that New York Central cars might have been put on this track (Fols. 171) and that during the times he was not there he could not tell the origin of the cars put upon this track or where they came from or went to. (Fol. 173).

This witness was also permitted to testify over the objection and exceptions of defendant that the Michigan Central maintained the tracks. (Fols. 156-158). He admitted that the repairs were made by New York Central men and that he did not know what percentage of the repairs the Michigan Central paid (Fols. 167-171). His testimony in this respect, obviously was prompted because he had sent certain bills for maintenance of these tracks to the Michigan Central (Fols. 169-170).

It developed later from the testimony of Samuel Mann, division accountant for the defendant for 20 years that the Michigan Central paid only the proportion of the expense of these tracks which the number of cars handled on this account bore to the total number of cars handled in the yard, the approximate estimate of which was from 8 to 9 per cent. (Fols. 2596-2598).

Mullen, government inspector at the international bridge testified that the number of cars

coming into this yard was slightly in excess of 1,000 a day and the number going out was from 1100 to 1200. That about ⅓ or 30 per cent of these cars represented Michigan Central business. The witness did not profess to know anything about the use of this yard generally or on the night of the accident. (Fols. 178-183.)

Doud's testimony (Fols. 184-216), fails to establish that these tracks were used exclusively for interchange with the Michigan Central on October 12, 1908 or at any other time. In 1908 this witness was yard master at East Buffalo in the VI. yard and (Fol. 209) and it was only on rare occasions when there would be no business for him as yard master that he went back to his work as yard conductor. (Fol. 212). He was mistaken in his testimony that in 1908 he was yard conductor and ran in and out of this yard (Fol. 187). He knew nothing of the character of the cars on the "Fence" track on Oct. 12, 1908, in fact he could not say that he was in the yard at all during that month (Fol. 205).

He further testified, folios 205-206:

"Q. And you don't know what these tracks were used for, or what cars were there on the fence track or these other tracks you have spoken of, October 12, 1908, do you?

A. No, as a matter of fact I don't, not on those dates, I wasn't sure, I couldn't tell.

Q. *So that there might have been either intrastate or interstate cars on those tracks without your knowledge?*

A. *It could have been possible; yes, sir.*"

Barry, a former Central brakeman, discharged for drinking while on duty (Fols. 224-225), says

that during 1907 and 1908 these tracks were used only for interchange of cars between the New York Central and the Michigan Central. He admits that he only worked there off and on during these years (Fol. 225). That he could not tell what they were used for when he was not there (Fols. 226, 227). That he did not know what cars were on the fence track on the night of the accident, whether they were interstate or intrastate (Fols. 228, 229).

Plaintiff's knowledge of the use of these tracks was confined entirely to his occasional work there as a switching or road engineer (Fols. 265-269). He knew nothing about the use of these tracks, or the cars on the same, the night of the accident (Fol. 628).

We submit that the vague, indefinite testimony of plaintiff's witnesses failed absolutely to establish that these tracks were used exclusively as interchange tracks or that the train on the fence track on the night of the accident was interstate in whole or in part.

Defendant's witness Brodie, former yardmaster and at the time of the trial a yard conductor, testified that prior to the accident the fence track was used for both intrastate and interstate traffic (Fols. 2561-2562). That there were times when the cars on this track were intrastate cars (Fol. 2576). That there were other tracks on which trains for Canada were placed and that these tracks were not in daily use for the receipt of cars for Canada (Fols. 2567-2570). He could not tell, of course,

what cars were on the fence track on October 12, 1908.

Defendant's witness Bronson was not in its employ at the time of the trial. He was the defendant's yardmaster at Black Rock in 1908, and from 1901 to 1910 was employed in and about this yard as clerk, car checker, yard brakeman and conductor (Fols. 2364, 2377), and was familiar with the fence track (Fol. 2376). He says the fence track was used at times for intrastate cars, at times for interstate cars, and at times for mixed trains, (Fol. 2380). He did not know what was on the track the night of October 12, 1908.

Mann, in addition to testifying as to the division of the expense of maintenance before referred to, testified (Fols. 2608-2611):

> "Q. And there were a large number of cars that were local cars from the industrial plants there and from Buffalo, that were made up there in that yard and taken to East Buffalo at points solely within the state?
>
> * * * *
>
> A. Yes."

Dehm, sworn by defendant, had been employed in this yard as general yardmaster since 1889. He was familiar with the fence track and testified that it was not assigned for any particular purpose (Fol. 2614). That it was used both for intrastate and interstate and mixed cars (Fol. 2617). Dehn also testified that the record of the trains on the fence track on the night of the accident had been destroyed by direction of the Interstate Commerce Commission under the act of June 8, 1914 (Fols. 2618, 2619). That records were re-

tained for only six years and after that destroyed (Fol. 2618).

Conductor Mattern, who was in charge of the movements of the engine and cars on the night of the accident to plaintiff (Fol. 1874), testified that the train on the fence track consisted of empty gondolas or empty box cars (Fol. 1807).

We submit that upon all of the evidence in the case it was disclosed that these tracks, and particularly the fence track, was not used exclusively for interstate cars. No witness in the case was able to tell the character of the cars on this track on the night of the accident. It did appear, however, that the train consisted entirely of empty cars. Such being the case, even if the cars had come from Canada, after delivery and unloading their interstate character ceased. Merely showing that they were to be hauled from the Black Rock yards to East Buffalo was not sufficient to establish interstate commerce.

The records of this train had been destroyed long before plaintiff asserted any claim under the Federal statute, so that the defendant's inability to produce the records certainly should not militate against it.

We submit that the verdict of the jury (Fol. 3365) was arrived at by pure speculation and guesswork, and that there is no evidence in the case to sustain it.

The real test under the Federal Employers' Liability Act is whether the employe was en-

gaged in interstate commerce at the precise time of the accident.

In *Osborne v. Gray*, 241 U. S. 16, the Supreme Court said, page 21:

> "The make-up of trains and the movement of cars are not matters which we may assume to know without evidence."

In *Erie R. R. Co. v. Welsh*, 242 U. S., 303, the Supreme Court said at page 306:

> "By the terms of the Employers' Liability Act the true test is the nature of the work being done at the time of the injury and the mere expectation that plaintiff would presently be called upon to perform a task in interstate commerce is not sufficient to bring the case within the act."

In *Lucchetti v. Philadelphia & R. Ry. Co.*, 22 Fed. 137, Dickinson, District Judge, said, pages 137-138:

> "It is essential to know under the statutes of the United States, not only that the defendant was at the time engaged in interstate commerce, but also (as the fact might be the defendant was likewise engaged in transportation within the state) that the plaintiff was at the time the cause of action arose, employed in interstate commerce work. This is settled beyond the necessity of the citation of authorities laying down the ruling."

The defendant's counsel requested the Trial Court to charge the jury (Fol. 3349):

> "That there is no evidence in the case from which the jury can find that the plaintiff was engaged in interstate commerce at the time of the accident,"

which was refused and an exception taken.

Defendant also moved for a nonsuit on this ground at the close of the plaintiff's case (Fol. 1416) which was denied and an exception taken (Fol. 1418). At the close of all the evidence the court was requested to direct a verdict for the defendant upon the same ground (Folio. 2006, 1424), which was refused and an exception taken. (Fol. 208). An exception was also taken to the submission of this question to the jury. (Fol. 2030).

We respectfully urge that this question is one which this court has jurisdiction to review.

Chicago, etc., R. R. Co. vs. Devinney, 239 U. S. 52.

Seaboard Air Line Ry. vs. Horton, 239 U. S. 595.

Seaboard Air Line Ry. vs. Padgett, 236 U. S. 668.

POINT III.

The Trial Court erred in charging the jury as requested by plaintiffs' counsel at folios 2296-2297 and also in its main charge to the jury at folio 2247.

"Mr. Ward: I withdrew the fifth. Your Honor has covered that.

The Court: The fifth is withdrawn. I have granted, 'If the Federal Employers' Liability Act applies, the case must be determined according to the law controlled by it, and in that case it is a question of fact for the jury to determine whether Kinney assumed the risk inherent in his employment, and also of the negligence of the defendant or of a fellow servant, if such risk is shown by defendant to have been known by plaintiff, or if it were so obvious that it must be

presumed that a person of ordinary prudence would have known it.'

I think that was embodied in my general charge.

Mr. Spratt: I except to that.

Mr. Ward: I withdraw that request, and I don't ask your Honor to pass on it. That one you have just read I withdraw."

The court had previously charged the jury in the precise language of this request (Fols. 3246, 3247).

"The burden of proving assumption of risk by the plaintiff also rests on the defendant and it is a question of fact for you to determine whether the plaintiff assumed the risk inherent in his employment, and also of the negligence of the defendant or of a fellow servant, if such risk is shown by the defendant to have been known by the plaintiff, or if it were so obvious that it must be presumed that a person of ordinary prudence would have known it."

This was not an offhand request made by counsel at the close of the charge of the Trial Court. The request, among others, had been carefully prepared by Mr. Ward and submitted to the court in advance of the main charge, in conformity to the request of the presiding judge (Fols. 3210, 3211). The request as prepared by Mr. Ward was followed word for word in the main charge of the court (Fol. 3247). It is true that Mr. Ward attempted to withdraw the request and we are not surprised at his effort to do so, when the seriousness of the error is considered. Mr. Ward, however, did not request the withdrawal of what had been charged in main, nor did the court treat the same as withdrawn as appears from the colloquy which took place:

"Mr. Ward: I withdraw the fifth. *Your Honor has covered that.*

The Court: The fifth is withdrawn. *I have granted,"*

and the court then proceeded to read the entire request to the jury, following the same by the statement:

"I think that was embodied in my general charge".

We submit that, not only did the trial court reiterate the charge in main but the request was not in fact or effect withdrawn, and the error was twice committed and emphasized to the jury. If however, this court is of the opinion that the withdrawal of the request was effected, then we urge that the court should in view of the statements of the Trial Court, regard the reading of the request, as a repetition and re-statement of the main charge, to which the exception of the defendant certainly is availing.

Respondent's counsel below devoted pages of brief to explain this charge to the Appellate Division, and the Court of Appeals at the same time asserting that its meaning was plain to the jury.

We direct this court's attention to certain statements in plaintiff's brief filed in the Appellate Division.

On page 45, he says:

"The particular request that the defendant complains of was withdrawn before the jury, *but even if it had not been withdrawn, there was no error in it."* (Italics ours).

and at page 46, referring to the main charge, he says:

> "The court then *properly charged* the language of the withdrawn request *which was the reason for the withdrawal.*" (Italics ours).

And at page 47:

> "*It is true that the language* of the withdrawn request *is not as clear and plain as might be desired*, and that is one reason why it was withdrawn."

We confidently assert that this charge, either in main or as requested, was absolute error and that it misstated long established principles of assumption of risk. *It permitted the jury to usurp the functions of the court.* If, as admitted by respondent's counsel, the charge was not as clear and plain as might be desired, then it cannot be said that the rights of this defendant were not prejudiced, for the jury may not have construed the charge the same way as the learned counsel who prepared it, and who admits that it is not clear and plain.

Under the Federal statute the defense of assumed risk has its former common law effect as a complete bar to the action.

Seaboard Air Line vs. Horton, 233 U. S. 492.

If we have any conception of the English language the charge as made and repeated left it to the jury to determine as questions of fact:

1. Whether the plaintiff assumed the risk inherent in his employment.

2. Whether he assumed the risk of negligence f the defendant or a fellow servant, if such sk was shown by the defendant to have been own by plaintiff.

3. Whether he assumed the risk of the negli- ence of the defendant or of a fellow servant, if ch risk was so obvious that it must be presum- l that a person of ordinary prudence would ve known it.

The decisions uniformly hold that under each f the conditions above stated the employee as- mes the risk as matter of law.

It was the contention of the defendant that the gine which Kinney was using was in proper ndition for service when he took it out. That e piston rod had just been repacked and that ere was no cut on the piston rod as claimed by e plaintiff (Fols. 2298, 2308, 2322-2338). That ere was no defect which required the engine to e taken out of service (See Exhibits 7, 8, 9, and arroll's testimony Fols. 935-978, 930, 931-934). very witness sworn, conceded that it was a com- on thing for piston packing to go wrong and that is might happen at any time or place and fre- uently very soon after the packing had been re- aired or new packing put in (Fol. 1064). Also hat old packing was better than new. It was lso conceded that, if the engine commenced to eak steam after it was taken out, the engineer had perfect right to turn it in or sidetrack it and end for another engine and that it was his duty o do so if in his judgment the occasion required

it (Fols. 999-1006, 1067, 1068, 1100). On Kinney's own admissions the jury could have found that the steam interfered with his view of signals on his first trip to Tonawanda, that it was getting worse all the time (Fols. 557-561) and would particularly interfere with his view of dwarf signals in his movement around the "Y" after dark (Fols. 448, 480, 482).

One of the risks inherent in Kinney's employment was that a proper engine might commence to leak steam while on a trip. He certainly assumed the risk of continuing to use the steamy engine under the conditions testified to by him upon the trial. He knew that the dwarf signal was the signal which he must follow, if he could see it. He could have shut off the steam or stopped his engine within from 2 to 4 feet, and been absolutely sure of the dwarf signal before he passed it. He knew that two main line passenger trains were due to pass tower 55 at the precise time he would reach the main line tracks. He admitted that the signal might be changed before he passed it, even if he had seen it green when at Hertel avenue. He knew that he must be absolutely sure of his signals around an interlocking plant and on a movement against the current of traffic. He knew that he was proceeding into a position of grave, potential danger, not only to himself but to hundreds of passengers on the main line trains. He assumed, however, to utterly disregard the fixed and controlling signal and to rely entirely on the hand signal of Mullen.

"Q. Did you pay any attention to the dwarf signal at all after you saw it at the

point you described before you passed Hertel avenue, between the words 'the' and 'current'?

A. No particular attention.

Q. *Did you pay any attention to it?*

A. *No, sir.*

Q. *So that you relied wholly on Mullen, did you?*

A. *Yes, sir.*"

The jury also had a right to find that the steam ich absolutely hid the dwarf signal from Kiny for a distance of over 500 feet, also interfer, to the knowledge of Kinney, with Mullen's nals, and that although Mullen gave the stop nal, Kinney did not so read it because of the aping steam.

Kinney testified, folio 697:

"The Court: He asks you now definitely whether or not this steam obscured your seeing those signals, and you can say yes or no.

A. *No, not wholly.*

Q. Did they to some extent?

A. *To some extent, yes.*"

d at 1364-1365:

"Q. Now, didn't the steam to some extent, interfere with your seeing Mullen's signals in going from tower I to where the accident occurred?

A. *It might have to some extent.*

Q. Didn't it, and didn't you testify that it did on the second trial at pages 154 and 155?

A. I can't answer your question.

Q. You can't answer that?

A. No.

Q. (Reading). 'Q. Now, did the steam interfere with your taking Mullen's signals?

A. *To some extent, it did.*' Is that true?

A. *Yes, sir.*"

Kinney admits that he didn't see the down finish of any of Mullen's signals (Fols. 1327, 1328).

It was a fair question for the jury as to whether or not the escaping steam did not obscure the down finish of Mullen's signals, rather than that the light went behind the caboose. *If Mullen gave the stop signal but Kinney failed to properly read it because of the escaping steam then we assert that this was one of the risks incident to his employment, which he assumed as a matter of law. Certainly if the steamy condition of this engine developed after Kinney took it out, he assumed as a matter of law, the risk of any injury resulting from its continued use.*

If on the other hand, the engine was leaking steam from almost every conceivable part when Kinney took it out as claimed by him (Fols. 442-449), he knew, as only an experienced engineer could know, the risks and hazards attending its use in the steamy condition. The negligence of the defendant was better known to him than to the defendant itself. He admits that it was his right as an engineer to inspect the work done before he took it out and if anything was wrong to have it corrected (Fols. 588-589). He was not required to take the engine out unless it was satisfactory to him but could demand another engine (Fols. 1067, 1068, 1100, 999-1006). Certainly, under such conditions, it must be said that Kinney assumed all risk of injury, due to the use by him of the defective, steamy engine. If the steam

evented his seeing the dwarf or interfered with ullen's signals so that Kinney misinterpreted em, in either event, he must shoulder the results.

If, as claimed by Kinney, the engine was steam- g from various parts when he took it out, the sk was not a "sudden and unexpected one" as aimed by respondent in the court below. The sk was present the very moment he entered the b and continued down to the moment of the ac- dent.

On the other hand, if the defect developed after e took the engine out, the risk commened om the time he discovered the condition, increas- g, perhaps, with the increased escape of steam, e darkness, and the position of grave, potential anger into which he knew he was going. One ove of the throttle and the situation would have eared. He could have seen the dwarf light. ullen's signal would have been clear, in fact he uld have then disregarded Mullen's signal en- rely, and obeyed the dwarf signal, which if seen as absolutely controlling. He assumed, how- ver, the risk of running his engine blindly rough the steam, and should be held responsible r the results.

We submit that this charge presents serious er- or. If its plain meaning was followed by the ury, and we must assume it was, then the jury ay have found that these risks were inherent n and incident to Kinney's employment or well

known and appreciated by him and yet have determined as a matter of fact, that they were not assumed by Kinney.

POINT IV.

Prejudicial error was committed by the Trial Court in its charge to the jury at folios 3247-3249 and also in charging as requested at folios 3299-3302, to which exception was taken at folios 3301, 3302.

The court charged the jury at folios 3247-3249,

> "The plaintiff can not be charged with the assumption of the risk arising from the defective engine, and from the steam escaping for that reason, unless the defect and the danger arising therefrom were both known to him or were so obvious that it must be determined that they would be observed and known by a person of ordinary prudence; *and even if the plaintiff knew of the defects in the engine when he started, or discovered them while en route on his trip, he can not be charged with assumption of risks unless he knew and appreciated the particular danger arising therefrom in the obstruction of his vision, and preventing him from seeing the dwarf signal at the critical moment of the accident,* or as he approached the dwarf, or unless such danger was so obvious that a person of ordinary prudence must be presumed to have known and appreciated it.
>
> And gentlemen of the jury, it is for you to consider in that behalf any evidence of the escaping steam previous to the time the plaintiff was approaching the dwarf, and whether it obscured his vision or prevented him from seeing the signals." (Italics ours).

The Court, at the request of plaintiff's counsel repeated the charge again at folios 3299-3302,

> "The Court: I guess there is some mistake here. The seventh does not appear on this list. It doesn't make any difference what its number is, this has been requested, and I will charge it, that 'even if Kinney knew of the defects in the engine when he started, or discovered them while enroute on his trip, he cannot be charged with assumption of risk, unless he knew and appreciated the particular danger arising therefrom in the obstruction of his vision, and preventing him from seeing the dwarf signal *at the critical moment of the accident*, or as he approached said dwarf, or unless such danger was so obvious that a person of ordinary prudence must be presumed to have known and appreciated it.' And in that behalf, any evidence that the escaping steam previous to the time that he was approaching the dwarf, did not obscure his vision or prevent him from seeing signals, should be considered by the jury." (Italics ours).

That is already in the charge. That is embodied in the charge.

> "Mr. Spratt: I except to that.
>
> Mr. Ward: I withdraw that particular request because I think your Honor covered it.
>
> The Court: You withdraw it now as a request? I have covered it.
>
> Mr. Spratt: I except to the withdrawal after it has been read and I except to that as charged in the main charge.
>
> The Court: I had only repeated what I already charged. Which do you wish to except to, what I charged in the main charge? Now that this is withdrawn it does not make any difference.
>
> Mr. Spratt: What you charged in the main charge.
>
> The Court: Yes, certainly, you may have an exception to that."

The court will observe that plaintiff's counsel made no attempt to withdraw this request until the same had been read in full and re-charged by the trial court. It is also obvious that the charge in main was taken word for word from the request as prepared and submitted by Mr. Ward. The error was therefore, twice committed, and emphasized to the jury. The defendant's exception goes not only to the charge in main but to the charge as requested.

If an employee is not to be charged with assumption of risk unless he knew and appreciated the *particular* danger at the *critical moment of the accident* then the defense of assumption of risk is a farce, in fact there is, under the common law, no such defense. The "critical moment of the accident" means the happening of the accident.

We again urge that when Kinney entered the employment of this defendant as engineer he knew from practical railroad experience that an engine in proper condition might become defective en route, or, to get down to the situation here involved, that the piston packing or some other part of the engine might give way causing steam to escape. This was one of the risks ordinarily incident to his employment, as is conceded by every witness. When such defects developed he had the absolute right to abandon the engine. He was in control. No one could better appreciate than he, the risk and danger of continuing to use the engine with the steam escaping sufficiently to absolutely obscure his vision of the fixed signals and

to also interfere with the hand signals of the brakeman. Is the accident the test of his assumption of risk as in effect charged by the court? Certainly not. The accident is the result of his continuing to run the engine under known and obviously dangerous conditions.

If on the other hand, he knew of the defects before he took the engine out, as testified to by him, must we follow him, an engineer of long experience, down to the *critical moment of the accident,* to the accident itself, before he is chargeable with the risk? The question answers itself. No such rule has ever been announced by this court.

The vice of this charge is emphasized when the court considers that the jury found that Kinney was guilty of contributory negligence, such finding being undoubtedly based on Kinney's admission that he utterly disregarded the dwarf signal because of the escaping steam.

In *Arizona Employers' Liability Cases,* 250 U. S. 400-421, the rule of assumed risk under the common law was plainly stated. Mr. Justice Pitney, delivering the opinion of the court, said at page 421:

> "The rule existing in the absence of statute, as usually enunciated, is that all consequences of risk inherent in the occupation and normally incident to it are assumed by the employee and afford no ground of action by him or those claiming under him, in the absence of negligence by the employer; and

> even risks arising from or increased by the failure of the employer to take the care that he ought to take for the employee's safety are assumed by the latter if he is aware of them or if they are so obvious that any ordinarily prudent person under the circumstances could not fail to observe and appreciate them; but if the employee, having become aware of a risk arising out of a defect attributable to the employer's negligence, makes complaint or objection and obtains a promise of reparation, the common law brings into play a new set of regulations, requiring the employer to assume the risk under certain circumstances, the employee under others. *Seaboard Air Line Ry. v. Horton*, 233 U. S. 492, 504, 505; 239 U. S. 595, 598, 599; and cases cited."

In *Southern Pacific Company v. W. S. Berkshire*, decided at the October term, 1920, of the Supreme Court of the United States, and not yet reported, that court said:

> "But an experienced railroad man cannot be supposed to have been ignorant that such a projection threatened danger and, knowing so much, he assumed the risk that obviously would attend taking the chances of leaning well out from the train."

In *Seaboard Air Line v. Horton*, 233 U. S. 492, the Supreme Court said, page 504:

> "Some employments are necessarily fraught with danger to the workman—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally

incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. Those the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them.

* * * * * * *

"When the employee does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment, without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employee assumes the risk, even though it arise out of the master's breach of duty."

We know of no authority which holds that the test of assumption of risk is the knowledge and appreciation of the *particular danger* at the *critical moment of the accident*, as charged by the trial court. We respectfully urge that the error complained of was so serious and prejudicial that it compels a reversal of this judgment.

POINT V.

The Trial Court erred in refusing to charge the jury as requested by defendant's counsel at folios 2227-2240 and in the charge as made.

"The Court: Yes. The twenty-first, that I have also modified. I will charge as modified and will first read the charge as requested "That if the plaintiff had notice on his first trip to Tonawanda that the escape of steam from the engine would interfere with his ad-

ing dwarf signals, and he did not exercise his privilege of sidetracking his engine, or securing another engine on his return to East Buffalo, but started on his trip to Black Rock, that he assumed the risk of the continued leaking of steam at the time of the accident.'

That I will find as requested with this modification that if Kinney knew of the defects in the engine when he started or discovered them while enroute on his trip, he cannot be charged with assumption of risk unless he knew and appreciated the particular danger arising therefrom in the obstruction of his vision in preventing him from seeing the dwarf signal at the critical moment of the accident, or as he approached the dwarf, or unless such danger was so obvious that a person of ordinary prudence must be presumed to have known and appreciated it and in that behalf any evidence that the escaping steam previous to the time that he was approaching the dwarf did not obscure his vision or prevent him from seeing the signals, should be considered by the jury.

Mr. Spratt. An exception to the refusal of the court to charge as requested."

There is involved here not only the error in refusing to charge as requested but the same error called to the court's attention under Point IV is repeated. The request made assumed all of the essentials upon which the jury might have found that Kinney assumed the risk attendant upon the continued use of the steaming engine. The jury found that Kinney was guilty of contributory negligence, this finding without doubt being based on Kinney's admission that he utterly disregarded the fixed dwarf signal because of the steam, and his further admissions that the escaping steam to some extent interfered with Mullen's signals.

This court in discussing the refusal of the court to instruct as requested on the assumption of risk said in Seaboard Air Line vs. Horton, 233 U. S. 492, 508.

> "Its harmful effect is conspicuously evident when we note that the jury, while finding that plaintiff did not assume the risk, at the same time found that he did by his own negligence contribute to his injury. Presumably, if instructed in the manner requested by defendant the jury would have found that the risk was assumed, and this would have entitled defendant to a judgment in its favor, instead of a mere mitigation of the damages, which was the consequence of a finding of contributory negligence."

See also the argument under Point III.

POINT VI.

The Trial Court erred in charging the jury as requested by plaintiff's counsel at folios 3309-3310:

> "The Court: 'If Kinney saw the dwarf signal showing green at, or as he approached Hertel avenue, he had the right to proceed, and if such light remained until after Kinney reached a point where he could not see it and it were afterwards changed by the towerman to purple, the jury can find that Kinney was not chargeable with contributory negligence, unless he received from Mullen a signal which Kinney understood to be a stop signal, in time for Kinney to avoid the accident by stopping his engine.' That you want an exception to, I suppose?
>
> Mr. Spratt: Yes, certainly.
>
> The Court: You may have it."

The jury had a right to find and may have found that Kinney paid no attention to the dwarf signal after he saw it when south of Hertel avenue but that for a distance of 500 feet or more and down to the time of the accident he relied solely on Mullen's hand signals (Fol. 529).

The most sharply disputed question in the case was whether Mullen's signals, for a considerable distance before the dwarf was reached, were stop signals or come ahead signals.

It appears in the record that on some trials Kinney testified he tried to stop because Mullen's signals became uncertain, on others because he received a stop signal, and on this trial because Mullen gave him a faster come ahead signal. (Fols. 1382, 698).

If he were uncertain of the signal given by Mullen, he was as much compelled to stop as if he had actually seen the purple light on the dwarf.

The jury could have found on the evidence, that Kinney became uncertain of Mullen's signals in ample time to stop and avoid the accident, and yet under this instruction of the court they could not charge him with contributory negligence. They could also have found, on the overwhelming evidence in the case that Mullen gave proper stop signals which Kinney should have recognized as such in time to stop and avoid the accident, and still under this charge they were bound to absolve him from contributory negligence if he misinterpreted the signals. If he was uncertain of

Mullen's signals it was his duty to stop. If Mullen gave proper stop signals in time for Kinney to stop, then Kinney's failure to understand them as such and stop was not only contributory negligence but such negligence was the sole cause of the accident. Relying on Mullen's signals absolutely, as Kinney claimed he was, he was compelled, at his peril, to be absolutely sure of the signals given. *To absolve Kinney from negligence because he may have misunderstood a signal properly conveyed to him by Mullen presents the most grevious error conceivable.* This error calls for a reversal of the judgment.

See also the argument under the next point.

POINT VII.

The Trial Court erred in charging the jury as requested by folios 3314-3315:

"Regardless of whether Mullen was attempting to give a proceed or a stop signal, Kinney cannot be charged with contributory negligence for not stopping his engine before he had reached the point where it was impossible to stop it in time to prevent the accident, unless he, from his position, had reasonable ground to doubt whether the signal was a proceed or a stop signal. And in that behalf the jury should consider the evidence that is claimed by Kinney that he saw the dwarf signal as showing green at the last time it was possible for him to see it. That he knew the switches could not be changed until he stopped, and that Mullen stood in such a position behind the caboose from Kinney, so that the signal Mullen was giving, even if it were intended by Mullen to be a stop signal, showed to Kinney only as a

proceed signal, and that Mullen maintained his position behind the caboose while giving such signal.

Mr. Spratt: Exception."

This charge means simply that if Mullen was giving plain certain stop signals Kinney was not chargeable with contributory negligence if he did not so interpret them. If Mullen's signals were stop signals and every witness who saw them, except Kinney, says they were, then Kinney was bound to recognize them as such and obey them. If he read a plain stop signal as a come ahead signal the negligence was certainly his not Mullen's. He was depending absolutely on Mullen, (Fol. 529). The court could with equal propriety have charged the jury that if the dwarf signal was at danger, but Kinney, being able to see it, believed it to be clear that he was not guilty of contributory negligence. It was not a case of reasonable doubt as to what the signals were. It was a case of knowing positively what signals were shown or given. If the steam caused him to misread the signal, then as before urged he not only assumed the risk, but was guilty of negligence. In discussing Kinney's failure to observe the dwarf signal the Court of Appeals said, (217 N. Y., 330):

> "I do not think that the escape of some extra steam tending to obscure his vision would be such a reason for relieving him from seeing the signal as he passed over the space of 400 or 500 feet between it and Hertel avenue. His movements were not controlled by any emergency. His engine was not moving on any schedule. It was going at a rate of only seven miles an hour. It was light and

he could have stopped in a few feet. It would have been a very simple matter to have stopped or slackened his speed if necessary as he passed the signal in order to observe its light. An engineer moving his engine into a position where if wrong he might endanger not only his own life but the lives of hundreds of others, ought not to be excused from the performance of some very important duty in the interest of safety by some inconsequential obstacle. Therefore, if the duty had rested solely upon plaintiff of reading the signal. I think the escape of steam would not have excused him and that he would have been guilty of negligence as matter of law, and for this reason I do not think the negligence of the defendant in furnishing a leaky engine, which I have assumed, becomes a material element in the disposition of the case."

This statement applies with equal force to Mullen's signals if the steam was the cause of Kinney's failure to properly read them. If on the other hand the steam did not interfere with Mullen's signals, then Kinney's error in interpreting them if properly given was the negligence which caused the accident.

Answering this assignment of error in the court below, plaintiff in his brief said:

> "This is another complaint on the subject of contributory negligence, and the respondent wishes to observe at this point that if the appellant is dissatisfied with the finding of the jury on the subject of contributory negligence respondent is willing to have that finding omitted and the judgment corrected accordingly."

We submit that this argument is not only frivolous but silly.

The contention of the defendant, sustained by every eye witness in the case, except Kinney, was that the dwarf signal not only was against Kinney but that Mullen gave him stop signals down to the very moment of the accident.

If the jury found that Mullen's signals were plain stop signals, given in time for Kinney to stop, but that they were mis-read by Kinney by carelessness, or because of the interference of steam, then the defendant was entitled to a verdict in its favor and not to a mere allowance of $8,000 on a verdict of $40,000.

We respectfully urge that this error was prejudicial and that the defendant by reason thereof has been denied rights and immunity under the Federal Act.

POINT VIII.

It is respectfully submitted that the Writ of Certiorari should be issued as prayed, and the errors complained of should be corrected by reversing the subsisting judgment of the Supreme Court of the State of New York.

MAURICE C. SPRATT,
Attorney for Petitioner.

HERBERT W. HUNTINGTON,
of Counsel.

To:

Hamilton Ward, Esq.,
Erie County Savings Bank Bldg.,
Buffalo, N. Y.

PLEASE TAKE NOTICE that the foregoing petition for certiorari and brief in support thereof will be submitted to the Supreme Court of the United States on Monday, October 3, 1921, at twelve o'clock noon or as soon thereafter as counsel may be heard.

MAURICE C. SPRATT,
Attorney for Petitioner.

HERBERT W. HUNTINGTON,
of Counsel.

Service of a copy of above notice, petition, and brief is acknowledged this....day of June, A D., 1921.

.....
Attorney for Respondent.

Office Supreme Court, U. S.
FILED
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WM. R. STANSBURY
CLERK

Supreme Court of the United States

OCTOBER TERM, A. D. 1921.

No. [redacted]110

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,

Petitioner,

vs.

JOHN W. KINNEY,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF OF PETITIONER.

MAURICE C. SPRATT,
Attorney for Petitioner.

HERBERT W. HUNTINGTON,
Of Counsel.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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In The

Supreme Court of the United States

OCTOBER TERM, A. D., 1921.

The New York Central and Hudson River Railroad Company,
Petitioner,

vs.

John W. Kinney,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of New York.

BRIEF OF PETITIONER.

I.

Statement of the Case.

1. Petitioner was at the time of the commencement of the action a domestic railroad corporation organized and existing under and by virtue of the laws of the State of New York.

2. On October 12, 1908, while employed by the defendant as a locomotive engineer, plaintiff met with the injuries complained of.

3. On or about February 6, 1909, notice was served by plaintiff on defendant under the Employers' Liability Act of the State of New York, being Chapter 600 of the Laws of 1902. (Rec. pp. 5, 6).

4. On or about June 30, 1909, plaintiff commenced an action against the petitioner in the Supreme Court of the State of New York, Erie County. The complaint, found at pages 2-5 of the Record, alleged among other things:

> "First: That the defendant New York Central and Hudson River Railroad Company is a domestic corporation, engaged in the business of operating a steam railroad *in and through various portions of the State of New York and especially within the City of Buffalo.*
>
> * * * * * * * * *
>
> Third: That heretofore, and on the 12th day of October, 1908, and for some time prior thereto, the plaintiff had been in the employ of the defendant, New York Central and Hudson River Railroad Company, as a locomotive engineer, and was engaged in operating a locomotive owned by such defendant *in and over its tracks within the State of New York.*" (Italics ours) (Record, pp. 2, 3).

5. Petitioner on or about August 4, 1909, answering the complaint,

> A. Admitted the occurrence of the accident but denied each and all of the allega-

tions of negligence on its part set forth in the complaint.

B. Alleged as a separate defense that the accident occurred through the negligence of plaintiff or competent fellow servants.

C. Set up as a separate defense assumption of risk. (Answer is found at pages 10-11 of the Record).

Various trials before amendment.

6. Upon the issue so joined said action was brought to trial in the Supreme Court, Erie County, New York, on February 3, 1910, and resulted in a verdict for the plaintiff of $20,000 which was set aside by the Trial Court and a new trial granted on the authority of Hallock vs. N. Y. O. & W. R. R. Co., 197 N. Y., 450, which authority established the principle that a head-end brakeman was a fellow servant and not a vice-principal.

7. *Second trial* was commenced January 3, 1911, on the issues framed by the original pleadings and resulted in a judgment for the plaintiff of $23,000 which judgment was reversed by the Appellate Division, Fourth Department and judgment of reversal entered in Erie County Clerk's office, January 8, 1912.

8. *Third trial* was commenced October 15, 1912, on the issues framed by the original pleadings and resulted in a judgment for the plaintiff of $12,000. The judgment was affirmed by the Appellate Division, Fourth Department but reversed

by the Court of Appeals of the State of New York. (Kinney vs. N. Y. C. & H. R. R. R. Co., 217 N. Y., 325).

Amendment of complaint setting up engagement in interstate commerce.

9. On March 15, 1916, *about seven and a half years after the injury occurred, and the cause of action, if any, accrued,* application was made by plaintiff to the Special Term of the Supreme Court, Erie County, for permission to amend his complaint by setting up, among other things, engagement in interstate commerce. On December 6th, 1916, an order permitting the service of the amended complaint was granted under the terms of which order the amended complaint was deemed to have been served March 15, 1916, the date of the application for leave to amend.

10. The amended complaint alleged:

"AND PLAINTIFF FURTHER ALLEGES upon information and belief, that both the plaintiff and the defendant, at the times, and in the manner above set forth, were then and there engaged in interstate commerce, and were subject to the provisions of an Act of Congress known as the Federal Employers' Liability Act which took effect in April, 1908."

11. Petitioner made due and timely objection to granting of the amendment upon the ground that the requested amendment introduced a new

cause of action under the Federal Employers' Liability Act which said new cause of action was barred by the Statute of Limitations contained in Section 6 of the said Federal Employers' Liability Act. The order of the Special Term was affirmed by the Appellate Division, Fourth Department. (Kinney vs. N. Y. C. & H. R. R. R. Co., 98 Misc., 11, Affirmed 171 A. D. 948).

Answer of petitioner to the amended complaint.

12. Petitioner thereupon filed and served its answer to the amended complaint (Record, pp. 12-14).

A. Denying the allegations of negligence.

B. Denying that, at the time of the accident the plaintiff and the defendant were engaged in interstate commerce or were subject to the provisions of the Federal Employers' Liability Act.

C. Set up as separate and distinct defenses, contributory negligence, assumption of risk and negligence of a fellow servant.

D. *Pleaded as a separate and distinct defense the Statute of Limitations contained in Section 6 of the Federal Employers' Liability Act*, alleging:

> "For a second, separate and distinct defense to the alleged cause of action in the

complaint set forth, this defendant further avers and alleges:

That the original action was commenced on the 30th day of June, 1909, setting forth a cause of action under the New York State Employers' Liability Act, and that issue was joined by the service of the defendant's answer on August 4, 1909; that reference is hereby made to such complaint as a part hereof; that recovery was sought under said Employers' Liability Act exclusively and that the case was tried three times upon this sole cause of action; that after the judgment entered upon the third trial in October, 1912, had been reversed by the Court of Appeals, the plaintiff herein served an amended complaint on the 7th day of December, 1916, in which a new cause of action is set forth for the first time under the Federal Employers' Liability Act by the amendment to the original complaint, wherein the plaintiff alleges, upon information and belief, that both the plaintiff and defendant, at the time and in the manner set forth in the complaint, were then and there engaged in interstate commerce and subject to the provisions of an act of Congress known as The Employers' Liability Act, which took effect in April, 1908.

The defendant further alleges that the accident upon which the original cause of action was based, occurred on the 12th day of October, 1908; that the cause of action under the Federal Employers' Liability Act was not pleaded or commenced until the service of the amended complaint on the 7th day of December, 1916, more than eight years after the date of the accident, and that said cause of action under the Federal Employers' Liability Act as set forth by said amendment, is barred by the Statute of Limitations contained in said Act, which provides that no action shall be

maintained under said act unless commenced within two years from the day the cause of action accrued.

The defendant further alleges: That the plaintiff ought not to have or to maintain this action because the same was not brought or maintained under said Employers' Liability Act, passed by the Congress of the United States, and which was approved April 22nd, 1908, because the same was not brought or instituted thereunder within two years from the time that the said alleged cause of action accrued thereunder."

13. The fourth trial resulted in a disagreement by the jury. The fifth trial resulted in a verdict in favor of the defendant of no cause of action, which was reversed by the Appellate Division for error in the charge.

14. The sixth trial resulted in a verdict for the plaintiff, the jury finding, (Rec., p. 604):

a. That the plaintiff and the defendant were engaged in interstate commerce.

b. That the total damage was $40,000 but that Kinney was chargeable with contributory negligence to the amount of $8,000 and rendered a general verdict against the defendant for $32,000.

15. Petitioner duly and timely appealed from the judgment entered upon the verdict of the jury and from the order denying petitioner's motion for a new trial to the Supreme Court, Appellate Division, Fourth Department of the State of New

York, which court unanimously affirmed the judgment and order appealed from.

16. The said Appellate Division granted petitioner's application for leave to appeal to the Court of Appeals, which appeal was duly taken.

17. *The Court of Appeals by a divided court affirmed the judgment and order, without opinion, Hiscock, C. J., McLaughlin and Crane dissenting, and the judgment became final June 22, 1921.*

18. Thereafter petitioner filed in this court its petition praying that a Writ of Certiorari issue to the Supreme Court of the State of New York, which petition was granted.

II.

The questions involved in this case and the exceptions submitted to the courts below are as follows:

1. Whether the amendment to the complaint, seven and one-half years after the cause of action accrued, alleging and asserting for the first time the engagement of the plaintiff and the defendant in interstate and invoking for the first time the aid of the Federal Employers' Liability Act, introduced a new and different cause of action from that originally set forth in the plaintiff's complaint.

2. Whether an amendment so changing the cause of action relates back to the commencement of the action or will be regarded as the commencement of a new action at the time of the allowance thereof as to which the running of the limitation of Section 6 of the Federal Employers' Liability Act was not therefore arrested.

3. Whether, after the amendment was allowed petitioner having plead and proven the statute of limitation contained in Section 6 of the Federal Act was entitled to judgment.

4. Whether the court erred in refusing to grant defendant's motion for a nonsuit (Rec., p. 258) and to direct a verdict for the defendant at the close of all the testimony (Rec., p. 550) upon the ground that there was no evidence tending to show that the plaintiff at the time of the accident was engaged in interstate commerce.

5. Whether the Trial Court erred in submitting to the jury the question of plaintiff's engagement in interstate commerce to which exception was duly taken by your petitioner (Rec., p. 551).

6. Whether the Trial Court erred in refusing to instruct the jury as requested by counsel for your petitioner.

> "That there is no evidence in the case from which the jury can find that the plaintiff was engaged in interstate commerce at the time of the accident." (Rec., p. 601).

7. Whether the Trial Court erred in instructing the jury (Rec., pp. 585, 593).

> "If the Federal Employers' Liability Act applies, the case must be determined according to the law controlled by it, and in that case *it is a question of fact for the jury to determine whether Kinney assumed the risk inherent in his employment, and also of the negligence of the defendant or of a fellow servant, if such risk is shown by defendant to have been known by plaintiff, or if it were so obvious that it must be presumed that a person of ordinary prudence would have known it.*" (Italics ours).

to which exception was duly taken by your petitioner.

8. Whether the Trial Court erred in charging the jury

> "that even if plaintiff knew of the defects in the engine when he started or discovered them en route he could not be charged with assumption of risks unless he knew and appreciated the particular danger arising therefrom in the obstruction of his vision, and preventing him from seeing the dwarf signal *at the critical moment of the accident.*" (Italics ours) (Rec., pp. 585, 593).

9. Whether the Trial Court erred in refusing to charge as requested by petitioner (Rec., p. 600).

> "That if the plaintiff had notice on his first trip to Tonawanda that the escape of steam from the engine would interfere with his taking dwarf signals and he did not exercise his privilege of sidetracking his engine or securing another engine on his return to East Buffalo, but started on his trip to Black Rock,

that he assumed the risk of the continued leaking of steam at the time of the accident."

and by charging as a modification to the request, the precise charge set forth in No. 8, above, to wit, that plaintiff did not under any circumstances assume the risk unless he

> "knew and appreciated the particular danger * * * * at the critical moment of the accident." (Rec., p. 600).

10. Whether the Trial Court erred in charging the jury (Rec. p. 595):

> "The Court: If Kinney saw the dwarf signal showing green at, or as he approached Hertel avenue, he had the right to proceed, and if such light remained until after Kinney reached a point where he could not see it and it were afterwards changed by the towerman to purple, the jury can find that Kinney was not chargeable with contributory negligence *unless he received from Mullen a signal which Kinney understood to be a stop signal*, in time for Kinney to avoid the accident by stopping his engine." (Italics ours).

thus absolving Kinney from contributory negligence even though he misunderstood a perfect stop signal properly conveyed or given to him by Mullen.

11. Whether the Trial Court erred in charging the jury (Rec., p. 596):

> "Regardless of whether Mullen was attempting to give a proceed or a stop signal, Kinney cannot be charged with contributory negligence for not stopping his engine before he had reached the point where it was impossible to stop it in time to prevent the accident, unless he, from his position, had reason-

able ground to doubt whether the signal was a proceed or a stop signal."

thus again absolving Kinney from contributory negligence even if Mullen was giving a perfect and clear stop signal, which Kinney was bound to recognize as such, and obey.

12. That the aforesaid propositions and exceptions thereto will be discussed in detail under the various points.

III.

Errors claimed.

1. It was error for the courts of New York State to hold that your petitioner was not entitled to judgment after having plead and proven the statute of limitations contained in Section 6 of the Federal Employers' Liability Act.

2. It was error for the courts of New York State to hold that the amendment to said complaint did not introduce a new and different cause of action.

3. It was error for the courts of New York State to hold that the original complaint stated a cause of action under the Federal Employers' Liability Act and that the amendment merely expanded or amplified what was alleged in support of the cause of action already asserted.

4. The state courts erred in holding and deciding that there was evidence in the case establishing that the plaintiff was at the time of the accident engaged in interstate commerce.

5. If plaintiff's engagement in interstate commerce was established, the Trial Court erroneously instructed the jury on the defenses of assumed risk and contributory negligence as before set forth under II, subdivisions 7-11.

IV.

Facts.

In the brief following the respondent will be referred to as plaintiff and the petitioner as defendant such being the designation of each respectively in the court below.

Annexed to the record submitted herewith is Plaintiff's Exhibit 1, a map showing the physical situation at the place of accident.

On October 12, 1908, plaintiff, an experienced locomotive engineer was injured when a freight engine which he was running came into collision with a fast mail train known as Michigan Central No. 3 at the junction of the Belt Line tracks of the defendant at what is known as tower 55. (Map, Ex. 1).

The defendant's railroad from Buffalo to Niagara Falls consists of two tracks. At the point of collision they run about due north and south but they are nevertheless known in operation as the "East-bound" and "West-bound" tracks. (Map, Ex. 1).

Trains moving from Buffalo to Niagara Falls use the West-bound track and trains from the Falls to Buffalo use the East-bound track.

The defendant also operates what is known as a "Belt Line" which consists of two tracks which connect with its main line at East Buffalo and passing around the easterly and northerly sides of the city join with the Niagara Falls tracks at two points, one point being at tower "H" and the other at tower "55" where the accident occurred. This construction of tracks formed what in railroad parlance is called a "Y" from its resemblance to that letter of the alphabet (Map, Ex. 1).

An engine starting at one point of this "Y" or triangle and traversing its three sides to the starting point will reverse itself exactly as if placed on a turntable and turned from (to illustrate) a "facing east" position to a "facing west" position.

It was while plaintiff was engaged in turning his engine on the "Y" that the accident at tower 55 occurred.

Plaintiff had just hauled a train from East Buffalo to Black Rock and had left it upon the "Southern" track the entrance to which is shown just to the left of Tower "H" (Map, Ex. 1).

Plaintiff had been instructed to take the caboose off the train which he had left on the "Southern" track and to put it on the rear of a train which was on a track known as the "Fence Track" but not shown on the Map, Ex. 1. When his engine was uncoupled from his train he ran it out upon the Niagara Falls west-bound track, backed to tower "H", then proceeded in upon the southern track for the purpose of coupling to the caboose. He coupled the forward end of the engine to the caboose and after uncoupling the caboose from the train backed with it to tower I (Map, Ex. 1).

On the next movement from tower "I" to tower "55" the caboose was therefore ahead of the engine and the movement was made against the current of traffic, or in other words, moved westerly on the east-bound or left-hand track of the "Y". This was for the purpose of enabling him to cross to the east-bound main or Niagara Falls track so that he might move with the current of traffic, on that track back to Black Rock. This intended movement of necessity caused him to cross the west-bound Niagara Falls track (Map, Ex. 1).

Kinney knew that a Michigan Central train and a New York Central train were due to pass tower "55" at about the time of the accident. (Rec. 113).

Under Rule 502 (Rec., pp. 127, 128) Kinney was in command of the engine on this movement, conductor Matler being then engaged with the yardmaster (Rec., pp. 326, 362).

Other rules of the company with which the plaintiff was familiar provided among other things, as follows:

> "27. A signal imperfectly displayed, a white light by night on any fixed signal or the absence of a signal at a place where a signal is usually shown, must be regarded as a stop signal and the fact reported to the superintendent." (Rec., p. 127).

Rule 106, provided:

> "In all cases of doubt or uncertainty the safe course must be taken and no risks run." (Rec., p. 127).

The accident occurred after dark (Rec., p. 89). The signal which was to govern Kinney's movement against the current of traffic onto the eastbound track was known as "Dwarf No. 6," which is located between the two "Y" tracks and 87 feet distant from the point of the accident (Map, Ex. 1, Rec., p. 74).

A green light displayed on Dwarf 6 indicated clear, or that Kinney might proceed by it, and make the movement desired unless the signal was changed before he reached it, in which event however the switches could not be changed until he had come to a full stop. (Rec., pp. 66, 96, 113).

A purple light displayed upon the dwarf signified danger and was a command to stop.

A light imperfectly displayed on the dwarf or the absence of a light were in either event stop signals, and prohibited a movement past the dwarf.

Kinney had a right to proceed as far as Dwarf 6, irrespective of whether the dwarf light was at clear or danger. Whether he proceeded past it depended on the signal displayed when he reached it (Rec., pp. 145, 199).

Kinney, as well as every other witness sworn in the case, concedes that the dwarf signal was superior to every other signal and that if it could be seen it absolutely controlled the movement (Rec., pp. 120, 195, 145, 503, 505).

Kinney claims that the light on Dwarf 6 looked green to him (Rec., p. 246) when he was about at Hertel avenue (Map, Ex. 1) or about 500 feet from the dwarf (Rec., p. 74). From this point he said he did not see the fixed signal again (Rec., p. 93), attributing his inability to see it to the steam that was escaping from his engine (Rec., pp. 63, 97).

The fact is that he paid no further attention to this signal but relied entirely on the hand signals given to him by Mullen the brakeman on the head end of the caboose (Rec., p. 96).

The testimony of every witness in the case except Kinney is that the light on Dwarf 6 was purple, meaning stop and every circumstance disclosed by the record indicates not only that the signal was against Kinney but that the switches were set for the east-bound and west-bound main line tracks. (Rec., pp. 338, 341, 349, 364, 268, 487, 271-272, 380-381, 400-401, 412, 391, 397, 329, 414, 445).

The signals and switches for all tracks at this point (tower 55) were handled from the tower by means of an interlocking machine, which was so constructed that the towerman could not give conflicting signals if the interlocking plant and the signal connections were in proper working condition, which was conclusively established (Rec., pp. 487, 488, 268).

Plaintiff admits that the steam obstruction was temporary and that by shutting off his steam or stopping his engine he could have seen the dwarf signal. (Rec., pp. 93, 97, 98, 110, 111). His engine was moving not to exceed 6 or 7 miles an hour (Rec., p. 63) and could have been stopped in from 2 to 4 feet (Rec., p. 113).

Kinney's further claim is that, Mullen the brakeman, whose signals he was following, had from time to time from about Hertel, been giving him easy come ahead signals. That just before the collision Mullen gave him a faster come ahead

signal and for that reason alone he attempted to stop his engine (Rec., pp. 127, 248). If, as claimed by Kinney, the dwarf signal was clear and Mullen's signals all come ahead signals there certainly was no reason why Kinney should reverse his engine merely because Mullen gave him a faster come ahead signal (Rec., p. 255).

Brakeman Mullen who gave the signals and every other witness in the case who saw the signals given by Mullen testified that the signals for 5 or 6 car lengths before the dwarf was reached were stop signals and that they were given repeatedly down to the very moment of the accident. (Rec., pp. 338, 344, 350, 364, 273, 288, 381).

Plaintiff admits although reluctantly, that the steam also interfered to some extent with his observation of Mullen's signals, upon which he says he absolutely relied. He testified (Rec., p. 127):

"The Court: He asks you now definitely whether or not this steam obscured your seeing those signals, and you can say yes or no.

A. No, *not wholly.*

Q. Did they to some extent?

A. *To some extent, yes.*"

And at (Rec., p. 248):

"Q. Now, didn't the steam to some extent interfere with your seeing Mullen's signals in going from tower I to where the accident occurred?

A. *It might have to some extent.*

Q. Didn't it, and didn't you testify that it

did on the second trial at pages 154 and 155?
A. I can't answer that question.
Q. You can't answer that?
A. No.
Q. (Reading). 'Q. Now, did the steam interfere with your taking Mullen's signals?
A. *To some extent, it did?'* Is that true?
A. *Yes, sir.*"

Kinney testifies that before he took the engine out on the first trip she was leaking steam from the belly of the boiler, from the left piston rod, from the union of the steam pipe and injector, from the throttle, and in the firebox (Rec., pp. 80-83). *Kinney admitted that he knew and appreciated this steamy condition when he took the engine out* (Rec., pp. 83, 85). She continued to leak steam from these places on the trip to Tonawanda (Rec., p. 86).

He had trouble in observing at least two dwarf signals on this trip (Rec., pp. 101, 102).

His next trip was to take a coal train to Black Rock (Rec., p. 48). The steam was getting worse all the time (Rec., p. 87). Kinney admitted that he had a right to inspect the engine before taking it out and if anything was wrong to have it corrected (Rec., p. 107). He was not required to take the engine out at all unless it was satisfactory to him, but could have demanded another engine. If trouble developed on the road he had a perfect right to sidetrack the engine and call for another. (Rec., pp. 193, 199, 180, 181).

Other facts will be discussed under the various points of this brief.

POINT I.

The amendment to the complaint alleging engagement of the plaintiff and defendant in interstate commerce introduced an entirely new cause of action, and having been made more than two years after the cause of action accrued was barred by the Statute of Limitations contained in Section 6 of the Federal Code. The Statute having been pleaded and proven the defendant was entitled to judgment.

The question here involved is whether the plaintiff after exploiting his cause of action solely under the state statute for eight years, can, in an emergency, abandon his claim under the state statute and by amendment set up for the first time facts tending to bring him within the protection of the Federal Statute.

While this court has upheld amendments where the original complaint pointed although imperfectly to a cause of action under the laws of Congress, as in

Seaboard Air Line Ry. vs. Renn, 241 U. S., 290,

or where the amendment involved merely the substitution of the personal representative of the deceased, as in

Missouri, Kan. & Texas Ry. Co. vs. Wulf, 226 U. S., 570,

we do not find that this court has yet passed upon this question where the facts were as set forth herein, except that the logic of the opinion in the Renn case leads unerringly to the conclusion that under facts similar to those in this case the amendment would not have been permitted.

It has been repeatedly stated by this Honorable Court that the Federal Employers' Liability Act is paramount and exclusive and supersedes all state law in the matter with which it deals.

Seaboard Air Line Ry. v. Kenney, 240 U. S., 489.

Second Employers' Liability Cases, 223 U. S. 1.

St. L., I. M. & S. Ry. v. Hesterly, 228 U. S, 702.

Wabash R. R. v. Hayes, 234 U. S., 86.

St. L. and San Francisco Ry. v. Seale, 229 U. S., 157.

M. C. R. R. Co. v. Vrieland, 227 U. S., 59.

Seaboard Air Line Ry. v. Horton, 233 U. S., 493.

Section 6 of the Federal Employers' Liability Act passed April 22nd, 1908, as amended by the Act of April 5, 1910, provides:

> "Sec. 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued."

The accident to the plaintiff occurred on October 12th, 1908. If the plaintiff and defendant were at the time engaged in an act of interstate commerce, the plaintiff's cause of action accrued on that day.

As in all such cases there was some uncertainty as to what the courts would hold was employment in interstate commerce. *The same uncertainty exists today.* There was however, no uncertainty or no ambiguity in the language of the statute providing that no action should be maintained under that statute unless commenced within two years from the day the cause of action accrued. Whatever may have been the doubts as to the application of the statute or the doubts as to its constitutionality, the requirement that an action must be commenced within two years was perfectly plain. To contend that in the face of the express limitations of the act it was permissible to wait more than two years from the accrual of the cause of action, or as in this case for eight years, to see how the courts construed the statute or whether it would be held constitutional under the attacks made upon it, is absolutely absurd, and is no excuse for ignoring the plain mandatory provisions of Section 6 of the Act. These were the excuses offered by the plaintiff and his attorney as grounds for the amendment. (Kinney vs. N. Y. C. & H. R. R. R. Co., 98 Misc. 11).

The second Federal act was declared constitutional December 15, 1912 (Second Employers'

Liability cases, 223 U. S. 1) and yet plaintiff did not ask for the amendment until March 4th, 1916, nearly four years later.

No claim has been made or can be made *that the plaintiff attempted to maintain or commence any action under the Federal Statute* for eight years after the cause of action accrued.

The original complaint alleged (Rec., pp. 2, 3):

> "First: That the defendant New York Central and Hudson River Railroad Company is a domestic corporation, engaged in the business of operating a steam railroad *in and through various portions of the State of New York, and especially within the City of Buffalo.*
>
> Third: That heretofore, and on the 12th day of October, 1908, and for some time prior thereto, the plaintiff had been in the employ of the defendant, New York Central and Hudson River Railroad Company, as a locomotive engineer, and was engaged in operating a locomotive owned by such defendant *in and over its tracks within the State of New York.*"

The allegations of the complaint generally, and as above quoted, contain no allegations even suggesting that either plaintiff or defendant was engaged in interstate commerce, but, on the contrary, plainly assert that neither was so engaged.

The cause of action was based squarely upon the New York Employers' Liability Act. There was not only an allegation in the complaint of

the service of a notice under the provision of said act, but a copy of the notice alleged to have been so served was attached to the complaint (Rec., p. 5). It is obvious that great care was taken by the plaintiff to bring himself safely within the provisions of the Employers' Liability Act of the State of New York.

Furthermore, upon none of the first three trials of this case was any proof given of interstate commerce nor was it even suggested that either might have been so engaged. Nor did the defendant's answer set up engagement in interstate commerce as a defense. For eight years this suit was absolutely silent as to interstate commerce.

The affidavit of Mr. Ward, plaintiff's counsel, filed in the Supreme Court, Appellate Division, Fourth Department, with the papers on appeal from the order granting the amendment, show that the plaintiff did not intend to bring his action under the Federal statute or to state a cause of action thereunder.

Mr. Ward's affidavit at folios 52-54 of that record stated:

> "As to the proposed amendment setting up the question of interstate commerce, deponent alleges that while the statute was adopted before the commencement of this action, yet the application of the statute was not understood by the profession generally, until developed by various decisions of the Court. That what is, and what is not interstate com-

merce, was unsettled, and that under the authority of Van Brimmer vs. Texas & Pacific Railway Company, 190 Federal 394, and similar cases, *deponent was of the opinion that the plaintiff in this action was not engaged in interstate commerce;* that in the case of Carr vs. The New York Central R. R. Co., reported in 157 A. D., 941, 35 Supreme Court Reporter 780, the Supreme Court of the United States overruled the authorities before mentioned, *and it would now appear that the plaintiff was engaged in interstate commerce, in accordance with the facts set forth in his affidavit;* that the Carr case has been decided since the last trial of this action.' (Italics ours).

Plaintiff in his affidavit used upon the motion stated as follows (R. 45-46) thereof:

"That as to the second proposed amendment, deponent alleges that at the time of the accident, and for sometime prior thereto, he was operating an engine engaged in general switching, in the yards of the New York Central Railroad Company in Buffalo and vicinity; that he moved loaded and empty cars destined for points outside the State and inside the State, and cars that had come from outside the State and from within the State, and that such movements were mingled together indiscriminately; that at the time of the accident deponent had taken a train of loaded cars, including loaded coal cars, which, as he is informed and believes, came from a point outside the State, from the East Buffalo yards to the Black Rock yards, and was turning his engine around preparatory to taking another train of cars from the Black Rock yards to the East Buffalo yards, included in which latter train of cars, as de-

ponent is informed and verily believes, were cars which had come from Canada, and that by reason of the foregoing deponent alleges that both he and the defendant at the time of the accident were engaged in interstate commerce, and deponent further alleges that the Federal Employers' Liability Act took effect a short time before his accident, that a similar previous Act had been declared unconstitutional by the United States Supreme Court, and that at the time of the commencement of this action it was not known whether the Second Employers' Liability Act would be sustained; that its scope and application had not been settled by the decisions of the courts, and it had not then been determined just what acts constituted interstate commerce, especially in relation to train movements and indiscriminate switching operation; that recently, as deponent is informed and verily believes, the Federal Courts have decided that persons engaged as plaintiff was at the time of his accident are engaged in interstate commerce, and believes that he cannot safely proceed to trial without amending his complaint and setting up the fact that he was engaged in interstate commerce at the time of his accident, because he is advised by his counsel, and verily believes, that should it appear upon the trial that he was so engaged, the courts would be obliged to decline jurisdiction under the State law, and deponent would not be in a position to urge the application of the Federal law."

It will be observed that Mr. Kinney's affidavit sets up facts not at all set forth in the original complaint, and entirely inconsistent therewith.

The decision of the Court of Appeals in Kinney vs. N. Y. C. & H. R. R. R. Co., 217 N. Y., 325, following the third trial of this case, left the plaintiff with little if any hope of recovery at common law or under the State Employers' Liability Act.

Chief Justice Hiscock, writing for the court, said page 330:

> "If the duty had rested solely upon plaintiff of reading the signal, I think the escape of steam would not have excused him and that he would have been guilty of negligence as matter of law, and for this reason I do not think the negligence of the defendant in furnishing a leaky engine, which I have assumed became a material element in the disposition of the case." (Streets vs. Grand Trunk Ry. Co., 76 App. Div. 480; Affd. 178 N. Y. 553).

Mr. Justice Hiscock, then discusses the plaintiff's claim of negligence on the part of Mullen saying in conclusion at page 332:

> "If he read the signal incorrectly or gave plaintiff the wrong signal, as is in effect claimed then we have a case of negligence on the part of a co-employee which has not been changed by the statute and which is not chargeable to the employer but is a bar to the right to recover."

Plaintiff's reason for turning to the Federal statute for relief must be very obvious to this court. His rights under the State and Federal statute were materially different. Under the Federal act plaintiff's negligence was not necessarily

a bar to his recovery, and the negligence of Mullen, if any, was the negligence of the defendant, and not of a co-employee. Under the State statute either was a bar to his recovery.

Plaintiff's counsel admitted in the Appellate Division, that the right of plaintiff under the two statutes was materially different and that under the Federal statute different and additional elements of negligence were chargeable to the defendant.

Mr. Ward said in his brief in the Appellate Division below, page 35:

> "Furthermore under the Federal act, *additional elements of negligence can be charged to the defendant.* The negligence of Mullen so much stressed by the defendant in the earlier trials, and because of which Justice Emery set aside the first verdict and the Court of Appeals set aside the third verdict, is now the negligence of the defendant." (Italics ours).

And at page 14:

> "Since the trial of the action under the Federal act the question of the plaintiff's contributory negligence is no longer determinative of his right to recover."

The object of the plaintiff in departing from the laws of the state under which he had been defeated after eight years of litigation, to those of the United States, is therefore very apparent.

The amended complaint differs from the original complaint, in that it increases the demand for damages from $30,000 to $50,000 and alleges (Rec., p. 8):

> "AND PLAINTIFF FURTHER ALLEGES upon information and belief, that both the plaintiff and the defendant, at the times, and in the manner above set forth, were then and there engaged in interstate commerce, and were subject to the provisions of an Act of Commerce known as the Federal Employers' Liability Act, which took effect in April, 1908."

If plaintiff was engaged in interstate commerce, then his original complaint failed to state any cause of action under the State Act, the Federal Employers' Liability Act being exclusive and superseding all State laws upon the same subject. By coming into court and alleging that the plaintiff was engaged in interstate commerce, the plaintiff admits that the action as brought and three times tried could not be maintained. It is not merely the addition of further grounds of liability. It is even more than a substitution of one cause of action for another. It is the substitution of the right to maintain an action barred by the express limitations of the Federal Statute, in place of a cause of action in which plaintiff has been substantially defeated after eight years of litigation.

Assume that by final judgment the plaintiff had been defeated in his action under the State Act,

could he then, eight years after the accident successfully institute and maintain suit under the Federal Statute? The question answers itself. Yet that is precisely what has been accomplished here under the guise of an amendment.

The original and amended complaint are vitally different. The amendment was not a mere amplification of the original pleading. It is not a difference of form but of substance. The original complaint by its plain language excluded all suggestion of right under the Federal statute. The amended complaint excludes all rights under the State statute. The cause of action originally pleaded was wholly inconsistent with the cause of action set forth in the amended complaint. Each excludes the other.

Under the facts here disclosed the plaintiff was, by the amendment permitted to substitute a new and distinct cause of action, in place of a cause of action asserted by him for eight years and abandoned only when the Court of Appeals had plainly indicated that a recovery could not be had thereunder. There was not only a departure from fact to fact, but from law to law.

Congress certainly meant something when it enacted Section 6 of the Federal Employers' Liability Act. Its meaning seems clear and unambiguous, yet if this judgment can stand we frankly admit that we fail to appreciate the meaning or purpose of the statute.

We respectfully urge that if the plaintiff was engaged in interstate, that this judgment for the reasons assigned is erroneous and should be brought to this court for correction and reversal.

The defendant having set up in its answer the Statute of Limitations, the burden of showing that the statute had not run was on the plaintiff.

Mason vs. Henry, 152 N. Y. 529.
Baker vs. Duff, 136 A. D. 13.

Authorities relied on by petitioner.

In *Union Pacific Railway Co. v. Wyler*, 158 U. S. 285, an action was brought by the plaintiff against the defendant based upon the general law of master and servant to recover damages for an injury, which happened to the plaintiff in Kansas. This petition was filed in the State Court of Missouri, September 25th, 1885, two years and five months after the injury. Action for damages for personal injury not arising from contract was barred by the general laws of Kansas after a period of two years. On October 30th, 1888, the first amended petition was filed by plaintiff and on November 2nd, 1888, a second amended petition was filed, which set up a cause of action against the defendant under and by virtue of Chapter 93 of the laws of Kansas of 1874. At least five years and six months had intervened between the date of the accident and the filing of the second petition. The statute law of Missouri bars

actions on account of personal injury in five years. The question of the operation of the statutes of limitation of both the States of Kansas and Missouri was involved, and, after stating that it was an elementary rule that limitations were governed by the law of the forum and not by the law of the place where the event happened, the court proceeded to the determination of the question as to whether the cause of action was barred by the five year limitation of law of the Missouri statute. The claim was that the second amended petition imposed an entirely new and distinct cause of action. Mr. Justice White in writing the opinion of this court said at pages 289-290:

> "Before considering the limitation which it is asserted results from the Kansas statute, we will determine whether the actions is barred by the law of Missouri, because if so, it will be unnecessary to decide whether the Kansas statute has an extra-territorial effect. The decisions as to the application of the Missouri law involves, first, the ascertainment of whether the amended petition presented a new cause of action. The legal principles by which this question must be solved are those which belong to the law of departure, since the rules which govern this subject afford the true criterion by which to determine the question whether there is a new cause of action in case of an amendment. In many of the states which have adopted the Code System great latitude has been allowed in regard to amendment; but even in those states it is held that the question of what constitutes a departure in an amended pleading is nevertheless to be determined by the rules of common law, which thus furnish the test for ascertaining whether

a given amendment presents a new cause of action even although it be permissible to advance such new cause, by way of an amendment."

After quoting from many authors and decisions as to what constitutes a departure, the learned jurist continues at page 296:

"The most common, if not the invariable, test of departure in law, as settled by the authorities referred to, is a change from the assertion of a cause of action under the common or general law to a reliance upon a statute giving a particular or exceptional right. * * * * The English courts, from which our doctrine upon this subject is derived, necessarily take judicial notice of acts of Parliament, yet there a departure is made and a new cause of action is asserted when a party who has at first relied upon the common law afterwards rests his claim to recovery upon a statute.

The amended petition, which averred the statute of Kansas, having asserted a new cause of action, the next question is, was recovery under this petition barred by the Missouri statute of limitations? The general rule is, that an amendment relates back to the time of the filing of the original petition, so that the running of the statute of limitations against the amendment is arrested thereby. But this rule, from its very reason, applies only to an amendment which does not create a new cause of action. The principle is, that, as the running of the statute is interrupted by the suit and summons, so far as the cause of action then propounded is concerned, it interrupts as to all matters, subsequently al

leged, by way of amendment, which are part thereof. But where the cause of action relied upon, in an amendment, is different from that originally asserted, the reason of the rule ceases to exist, and hence the rule itself no longer applies."

The Wyler case, we believe, is an absolute authority for our contention that the departure from the state statute to the Federal statute set up an entirely new and distinct cause of action, and this case is also an authority for our contention that the amendment does not and cannot relate back to the time of the filing of the original complaint, so as to avoid the bar, the statute of limitations contained in the Federal Employers' Liability Act.

In Seaboard Air Line Railway v. Renn, 241 U. S., 290, *the original complaint stated a cause of action, although perhaps imperfectly, under the Federal statute.* The defendant upon the trial of action sought some advantage from this fact and the Trial Court over the defendant's objection permitted the complaint to be so amended as to state distinctly the defendant's engagement and the plaintiff's employment in interstate commerce. This court held that the original complaint sufficiently stated a case under the Federal act without amendment. The court, however, said at pages 293-294:

"If the amendment merely expanded or amplified what was alleged in support of the cause of action already asserted it related

back to the commencement of the action and was not affected by the intervening lapse of time. Texas and Pacific Ry. v. Cox, 145 U. S. 593, 603-604; Atlantic and Pacific R. R. v. Laird, 164 U. S. 393; Hutchinson v. Otis, 190 U. S. 552, 555; Missouri, Kansas & Texas Ry. v. Wulf, 226 U. S 570, 576; Crotty v. Chicago Great Western Ry., 95 C. C. A. 91; S. C. 169 Fed. Rep. 593. But if it introduced a new or different cause of action, it was the equivalent of a new suit, as to which the running of the limitation was not theretofore arrested. Sicard v. Davis, 6 Pet. 124, 140; Union Pacific Ry. v. Wyler, 158 U. S. 285; United States v. Dalcour, 203 U. S. 408, 423. * * * * *

In these circumstances, while the question is not free from difficulty, we cannot say that the court erred in treating the original complaint as pointing, although only imperfectly to a cause of action under the law of Congress And this being so, it must be taken that the amendment merely expanded or amplified what was alleged in support of that cause of action and related back to the commencement of the suit, which was before the limitation had expired."

In *Troxell v. D. L. & W. R. R. Co.*, 227 U. S. 334, this court clearly indicated that an action brought under the Federal Act sets up a different cause of action than an action under the Pennsylvania statute. The particular question here involved was not raised in that case for the reason that the second action was brought under the Federal statute within two years after the cause of action accrued.

In *Atlantic Coast Line R. R. v. Burnette*, 239 U. S. 199, it was distinctly held that even though the statute of limitations was not pleaded the defendant could take advantage of the fact that the action was brought too late. The court said at page 200:

> "It would seem a miscarriage of justice if the plaintiff should recover upon a statute that did not govern the case, in a suit that the same act declared too late to be maintained.
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> * * * * * * *
>
> The record shows a case to which the Act of 1908 did not apply.
>
> * * * * * * *
>
> It also shows that the action was brought too late, and that the defendant insisted upon that point, although it had not pleaded what was apparent on the allegations of the declaration and the admissions of the answer".

In *Amer. R. R. of Porto Rico v. Didricksen*, 227 U. S. 145, this court said at page 149:

> "The cause of action which was created in behalf of the injured employe did not survive his death nor pass to his representatives, but the Act, in case of the death of such an employe from his injury, creates a new and distinct right of action for the benefit of the dependent relatives named in the statute."

The same ruling was adhered to in *Gulf, Colorado, etc. Ry. Co. v. McGinnis*, 228 U. S. 173, 175.

In *Hogarty v. Phila. & R. Ry. Co.*, 255 Pa. 236, the plaintiff brought a common law action to which the defendant had interposed a defense. Four years after the accident he was permitted to amend his complaint setting up the Federal Act.

The court said, page 241:

"As the Act of Congress, and not the common law, gave the plaintiff a right to recover, his pleadings ought to have shown that his case was within the Federal statute, and proof of this was a material part of it."

And at pages 244-245:

"While a plaintiff, pleading only a common law right of action against a railroad company, may not invoke the Federal Employers' Liability Act, the company, in its defense, may, of course, rely upon the Act of Congress, if it can show, or the testimony offered by the plaintiff shows, that it was engaged in interstate commerce at the time the plaintiff was injured; St. Louis, Iron Mountain & Southern Ry. Company v. Hesterly, 228 U. S. 702; North Carolina Ry. Company v. Zachary, 232 U. S. 248; Toledo, St. Louis & Western Railroad Company vs. Slavin, 236 U. S. 454.

In the case at bar, as already observed, plaintiff's original statement showed nothing but a mere common law right of action against the defendant. By it the railroad company was notified to come into court and defend against a common law charge of negligence. Nothing within its four corners even hinted that plaintiff had undertaken to hold it liable under the Act of Congress which had given him a cause of action. In view of his receipt of benefits, he had no common law right of action, and so the record stood until more than four years had elapsed from the time he had acquired a cause of action against it under the Federal statute; but that statute provides that no action shall be maintained under it 'unless commenced within two years

> from the day the cause of action accrued;' and we now come to the consideration of the second question, of which little need be said, as we regard it as settled by a ruling of the Supreme Court of the United States, announced since we heard this appeal."

And later in its opinion the court, in referring to the Renn case, *supra*, said, page 247:

> "It clearly appears from this last utterance of the Supreme Court of the United States that if Renn's original complaint had averred merely a common law right of action against the railway company, with nothing in it indicating that the employer was operating a line of railroad from one state into another, the amendment would have been improperly allowed, for the reason that it introduced a new cause of action under the Federal Employers' Liability Act, which had been barred by the express terms of that act after two years from the time of the accident."

In *Allen v. Tuscarora Valley R. R. Co.*, 229 Pa. 97, 30 L. R. A. (N. S.) 1096, 1100-1101, a cause of action was brought at common law to recover damages for injuries alleged to have been sustained by the plaintiff through defendant's failure to equip its cars in ordinary use and plaintiff, to obviate the defense of assumed risk, asserted against his cause of action, sought leave to amend his complaint, so as to allege a cause of action under the Federal Safety Appliance Act. To this proposed amendment defendant objected upon the ground that it would introduce a new and different cause of action against which a bar of

the statute of limitations had already run. In reversing the allowance of the proposed amendment by the court below, the Supreme Court of the State of Pennsylvania said, page 101:

> "The Act of Congress is the basis of the plaintiff's claim, as laid in the amended statement; while, in the original statement, the basis of the claim is the failure of the carrier to perform its common law duty to him as its employee. The amendment is not a restatement or the statement in a different form, of the same cause of action, but the averment, of a statutory cause of action in which the liability is different and greater than in an action at common law. It deprives the defendant of a valuable right, viz., the defense of the assumption of risk by the plaintiff, which is not permissible: * * * * * * We think it clear that the amendment to the statement of claim introduced a new and different cause of action, which was barred by the statute of limitations, and, therefore, under the well-settled rule in this state, it should not have been allowed."

And at page 102:

> "The original statement, it is true, averred the injuries of the plaintiff and the alleged negligent act of the defendant by which they were caused, but there was no intimation in the statement that the carrier was engaged in interstate commerce, or that the defendant's cars were equipped with couplers in violation of the Act of Congress. Proof of the existence of these two additional facts was required to sustain the action as amended, and this is one of the tests in determining whether the amendment introduces a different cause of action. * * * * *
>
> It is also true that if, as claimed by the

plaintiff, all the facts necessary to sustain a recovery on the amended statement were set forth in the original statement, the amendment would still be a change or departure from the original statement, not from fact to fact, but from law to law, from an action founded on the common law to one founded on a statute abrogating the common law, which is equally effective to prevent an allowance of the amendment. In such case the plaintiff bases his right of recovery upon other and different law, instead of other and different facts, and it constitutes a departure from the original cause of action; Union Pacific Ry. Co. v. Wyler, 158 U. S. 285; Boston & Maine R. R. Co. v. Hurd, 108 Fed. Repr. 116."

In *Hall v. Louisville & N. R. R. Co.*, 157 Fed. 464, the plaintiff who had brought an action under the statute of the State of Florida, sought to amend her complaint so as to set forth a cause of action under the first Federal Employers' Liability Act of 1906. The statutory limitation of one year, described by the act, had expired.

The Circuit Court of the United States for the Northern District of Florida said, page 466:

"Does the amendment relate back to the time of the bringing of the suit, so as to prevent the application of the statute to the case at bar? Such statutes are statutes of quiet and are recognized by all courts in cases where they apply, as a valid, substantial and legal defense. The question of 'relation back' of amendments is a fiction of the law, and should never be allowed, when to do so would to the prejudice of a litigant deprive

him of a substantial legal right. The defendant against whom any party has a right of action, has a right to presume that such party has abandoned that right in cases where he has failed to assert it within the time prescribed by law."

In *Hughes v. N. Y. O. & W. R. R. Co.*, 158 App. Div. 443, the accident occurred in Pennsylvania and the action was brought under the Employers' Liability Act of that state. The employee was injured April 21st, 1910, and the action brought on January 13th, 1911. Plaintiff died and his administrators in February, 1913, were substituted, and served an amended complaint setting up the Federal Employers' Liability Act. It was held that the cause of action, though introduced by the amendment, was barred by the two years statute.

The court said at page 444:

"The action was not brought under that act, but is specifically based on the common law as modified by the statute of the state. An action under the Federal law must be begun within two years from the time the cause of action accrued (35 U. S. Stat. at Large 66, §6, as amd. by 36 id. 291, §1), but after nearly three years it is sought to convert the action under a State law into an action under the Federal law, thus extending the statute by a substituted cause of action. On April 5, 1910, the Federal act was amended so as to provide 'That any right of action given by this act to a person suffering injury shall survive,' etc. (35 U. S. Stat. at Large, 66 §9, added by 36 id. 291, §2). But the right cannot survive the time limited for its exercise, and when

the person to whom the right is initially given elects to proceed under the law of the state, the right to proceed under the Federal statute is at least dormant, and ceases after the expiration of the two years. The Federal statute is tendered to him who, entitled, chooses to employ it. He may prefer the law of the state, as the injured person did in the present instance. But such law cannot be exploited and, upon emergency, the action be changed into one under the Federal law. There is not a suggestion of fact in the original complaint indicating intention to avail of the Federal statute."

See also *Carpenter vs. Cent. Ver. R. Co.*, 107 Atl. 569 (July 3, 1919).

In *Ryan as Admrx. v. N. Y. C. & H. R. R. Co.*, 171 App. Div., 958, 971, plaintiff's intestate met with an accident June 30th, 1910, which resulted in his death. He was at the time of the accident employed by the defendant as a yard conductor at defendant's depot yards in the City of Albany. Letters of administration were issued to plaintiff November 29th, 1910, and on January 27th, 1911, she caused to be served on the defendant a notice under Section 201 of the Labor Law. The action was started March 7th, 1911, and on March 28th 1911 issue was joined. The action was brought to trial in April, 1915. In the course of the trial a witness for the plaintiff, in answer to a question put to him on direct examination, stated that the train was to go to Boston, whereupon defendant's counsel moved to strike out the answer as

calculated to bring the case within the provisions of the Federal Act, whereas the complaint contained no allegations that when intestate met his death he was employed by the defendant in, or that the defendant was then engaged in interstate commerce. Plaintiff's attorney then made a motion to amend the complaint so as to allege interstate commerce. The motion was denied and the answer was stricken out on motion of defendant's counsel. Plaintiff again renewed the motion and the same was again denied. A juror was then withdrawn and a motion to amend made at Special Term, which was denied by Mr. Justice Chester. An appeal was taken to the Appellate Division, Third Department, where the order was affirmed.

In Kinney v. N. Y. C. & H. R. R. Co., 166 N. Y. S. 868, the question as to whether the statute of limitations of two years was a bar to the cause of action set up in the amended complaint in this action was squarely passed upon. Mr. Justice Wheeler said:

> "We, therefore, have presented the question whether the statute of limitations of two years prescribed by §6 of the Federal Act, applies to this case. If it does then it would be idle to grant a new trial, for no recovery could be ultimately upheld. We think the case of Seaboard Air Line Railway v. Renn, 241 U. S., 290, is decisive of the question here presented. In the case cited the Trial Court permitted an amendment to the complaint so as to state distinctly an employment in interstate commerce at the time of the accident.

The defendant's counsel objected to the amendment in that the original complaint did not state a cause of action under the act of Congress; that with the amendment the complaint would state a new cause of action under that act, and that, as more than two years had elapsed since the right of action accrued, the amendment could not be made the medium of introducing this new cause of action consistently with the provision in §6 of the act.

The plaintiff recovered, and the railway company carried the case to the Supreme Court of the United States on the question raised. The Supreme Court held that in the particular case before it, the original complaint sufficiently stated a case under the Federal Act without amendment. The court, however, said: 'If the amendment merely expanded or amplified what was alleged in support of the cause of action already asserted, it related back to the commencement, and was not affected by the intervening lapse of time. (Texas & Pacific Ry. v. Cox, 145 U. S. 593, 603-604; Atlantic & Pacific R. R. Co. v. Leard, 164 U. S. 393; Hutchinson v. Otis, 190 U. S., 552, 555; Missouri, Kansas & Texas Ry. v. Wulf, 226 U. S. 570, 576; Crotty v. Chicago Great Western Ry., 95 C. C. A. 91; s. c. 169 Fed. Rep. 595). But if it introduced a new or different cause of action, it was the equivalent of a new suit, as to which the running of the limitation was not therefore arrested. (Secord v. Davis, 6 Pet., 124, 140; Union Pacific Ry. v. Wyler, 158 U. S. 285; United States v. Dalcour, 203 U. S. 408-423).'

The opinion then proceeds to show the amendment allowed did not violate the rules above enunciated, because the original complaint set forth sufficient facts to bring the case under the Federal Act, and the amend-

ment allowed simply amounted to an amplification of what had already been alleged.

It goes without saying that had the original complaint failed to state facts sufficient to bring the action under the law of congress, the two year limitation would have applied. The Federal Act wherever it applies, is exclusive of all other remedies. If the case comes under the Federal Act, a recovery must be had under the provisions of that act, or not at all."

St. Louis, San Francisco & Texas R. Co. v. Seale, 229 U. S. 156.

Taylor v. Taylor, 232 U. S. 363.

"When, therefore, the jury found that the plaintiff in this action was engaged in interstate commerce at the time of the accident, we are unable to discover how the plaintiff can expect to sustain any verdict which he might obtain, for the reason that more than two years had expired before his complaint was amended setting forth facts bringing his case under the Federal Act, which was tantamount to setting forth a new cause of action.

It should be noted that the special verdict of the jury is in accordance with the allegations of the plaintiff's complaint, and of his own contentions. I am not unmindful of the fact the Special Term of this court permitted the amendment in question over the objection of the defendant, and that on an appeal from the order allowing the amendment, the Appellate Division affirmed the order.

The plaintiff's counsel may contend that these adjudications are controlling. We are not aware whether the case of Seaboard Air Line Railway v. Renn, 241 U. S., 290, was specifically called to the attention of the court. *Nevertheless, it is sufficient to say*

that the statute of limitations is a matter of defense, to be pled and proved, and unless so pled and proved by the defendant, cannot be availed of as matter of defense. So we think the Special Term properly permitted the amendment setting up the fact that the plaintiff was, at the time of the accident, engaged in interstate commerce, leaving it for the defendant to plead the two years limitation prescribed by the statute." (Italics ours.)

The defendant as before pointed out, did plead and prove the statute of Limitations.

In Findley vs. Coal & Coke Ry. Co., 87 S. E. 198, there was before the court the question of an amendment setting up a cause of action under the Federal statute. The court after pointing out the distinction between the state statute and the Federal Act, said, page 201:

"Obviously, therefore, the duty of the master under the state law, though similar in some respects to that imposed on him by the Federal Act is not identical therewith, or is the right of the servant the same under the two acts. Moreover facts applying the Federal statute exclude the operation of the state statute as effectually as if it were nonexistent. It does not constitute the basis or ground of the action at all. St. L. & San Francisco Ry. Co. vs. Seale, 229 U. S. 153. * * * Second Employers' Cases, 233 U. S. 1. * * * Mich. Cent. Ry. vs. Vrieland, 227 U. S. 59, * * *."

"If the duty violated or broken were contractual in its nature, the contract would certainly have to be pleaded and there could be no recovery upon proof of a contract differ-

ent from the one declared upon. Two wholly unconnected statutes imposing duties of different natures can no more constitute the basis of a single right of action than two unrelated contracts."

"The contracts came on by pleading and the statute by judicial cognizance. This merely formal difference cannot vary the principle applicable to the substantive rights. On this subject Mr. Justice White, now Chief Justice, delivering the opinion of the court in Union Pacific Railway Co. v. Wyler, 158 U. S. 285. * * * * * said:

'As the first petition proceeded under the general law of master and servant, and the second petition asserted a right to recover in derogation of that law, in consequence of the Kansas statute, it was a departure from law to law.'

Accordingly it was held in that case that the second petition stated a new cause of action. In Missouri, Kansas & Texas Ry. Co. v. Wulf, 226 U. S. 570, * * * a petition stating facts bringing the case within the Federal statute was amended only as to the capacity in which the plaintiff sued. By her first petition, she had sued in her individual capacity. By the second, she sued as personal representative. *In all other material respects the second petition was identical with the first.* The court held the amended petition did not state a new cause of action. In this case the declaration as originally prepared and filed and as it was when the first trial was had disclosed no fact that in any way suggested the plaintiff's decedent had been killed while engaged in interstate commerce. *The amended count introduced facts which it is claimed, made the case one within the Federal statute. If they did, the amend-*

ment according to the ruling in Union Pacific Ry. Co. v. Wyler, introduced a new cause of action.'' (Italics ours.)

In Ft. Worth & R. G. Ry. Co. v. Bird, 196 S. W., 597, the deceased was killed October 11, 1911. The suit was originally instituted March 21, 1913, the plaintiff suing in her individual capacity. The original petition did not state a cause of action under the Federal Employers' Liability Act, the only expressions at all suggesting the interstate feature being the allegations of the character of the deceased's employment and that the Ft. Worth & Rio Grande Railway Company, incorporated under the laws of the State of Texas, constituted a part of the system of railway lines known and designated as the St. Louis San Francisco Railway Company of Texas, and also known as the Frisco system. On April 17, 1915, plaintiff filed an amended petition asserting her right to recover as administratrix *and also that at the time of the accident both the deceased and the railway company were engaged in interstate commerce.*

The court said, page 598:

''The irresistible conclusion, as it seems to us, to be drawn from the pleading of the plaintiff filed prior to her amendment of April 17, 1915, is that her action was brought under the Texas Statute (Revised statutes 1911, art. 4694) as it existed and was construed prior to the amendment by act approved April 7, 1913 (Gen. Laws 1913, p. 288). If, therefore the amended petition of

> the plaintiff filed April 17, 1915, amounted to an abandonment of her original cause of action, and to the setting up of a new and distinct cause or right of recovery it is clear that the defendant's plea of limitation was well taken. For in such case, under the Federal Employers' Liability Act, the plaintiff's cause was barred two years from the death of the deceased which was as alleged and shown on October 11, 1913."

The court then cites and quotes from Union Pacific Ry. Co. v. Wyler, and other cases and continues page 599:

> "A consideration of the cases cited constrains us to hold that the amended pleading of the appellee filed in this case on April 17, 1915, set up a new cause of action which was barred by the two-year statute of limitation, not only, as stated by the Federal Employers' Liability Act, but also under the Texas Statute on the subject. Considering the plaintiff's original petition, and all amendments prior to the one upon which the trial proceeded, it seems evident that the plaintiff sought to maintain her action under the Texas Statute as it existed prior to the amendment of 1913," and after referring to the pleadings the court continues, page 599.
>
> *"This allegation makes it evident that the pleader in framing the original pleadings, did not rely upon or have in mind a resort to the Federal Employers' Liability Act. Unquestionably therefore, both by the test as given by our own Supreme Court, and by the rule as applied and illustrated by the Supreme Court of the United States in the decision that we have cited, the plaintiff's amended petition upon which the recovery*

was had set up a new cause of action." (Italics ours.)

The court after pointing out the differences between the Texas Statutes and the Federal Employers' Liability Act continues at page 600.

> "It thus clearly appears that the amended pleadings and the previous pleadings were not subject to the same defenses and that there was a clear departure of pleading from the different laws of one Sovereignty, the State, to those of another, the United States."

In Walker vs. Iowa Cent. Ry. Co., 241 Fed. 395, the case was commenced in the State Court of Iowa and was removed by the defendant to the United States Circuit Court. The injury occurred December 8th, 1908. The case was tried and resulted in a verdict for the plaintiff in May, 1912. The defendant took the case to the Circuit Court of Appeals where the judgment was reversed for error in the instructions February 26, 1913. The plaintiff filed a petition for a rehearing in the Circuit Court of Appeals in which for the first time the question was raised that the cause of action was under the Federal Employers' Liability Act. The petition was overruled May 15, 1913. The petition for Certiorari was denied by the United States Supreme Court October 26, 1913. On November 27, 1914, the plaintiff with leave of court filed an amendment to the original petition, in which for the first time he sought to recover under the Federal Act. The

defendant demurred, on the grounds that the cause of action set forth in the amended petition was barred both by the two-year limitation of the Federal Act and the Statute of Limitation of the State of Iowa. Reed, District Judge, after discussing the allegations of the original pleadings and that the same did not allege or show facts bringing the case within the Federal Act and also that the case was not tried on that theory and distinguishing the case from M. K. & T. Co. vs. Wulf, 226 U. S. 570, and other similar cases said, page 400:

> "There seems to be no escape from the conclusion that, if the two year limitation prescribed by the Employers' Liability Act, in which actions to recover thereunder must be brought, has any force, the cause of action alleged in this amendment was barred when the amendment of November 27, 1914, was filed and cannot be maintained." Citing cases.

The demurrer was sustained and later a motion for a rehearing was made and denied.

In Roberts Federal Liability of Carriers, the author says at §696, pages 1210-1212:

> "It is provided in Section 6 of the Employers' Liability Act that no action shall be maintained under the statute unless commenced within two years from the day the cause of action accrued. All actions, therefore, for injuries or deaths arising in interstate commerce must be instituted within two years from the day the cause of action accrued. To this extent there has been no

diversity of opinion among the courts or much difficulty in the application to concrete facts. But when a suit is instituted for personal injuries or death of an employee within the time limited by the Statute and the plaintiff, after the lapse of two years, amends his petition or complaint the commencement of the suit within the two years does not prevent the running of the Statute of Limitation against such an amendment if the amended petition or declaration introduces a new or different cause of action from that stated in the original complaint; for, while a new cause of action may be introduced by amendment, the established limitation on the operation of its relation to the commencement of the suit is, that if the amendment introduces new matter or a different cause of action not with the *lis pendens* as to which the Statute has operated as a bar at the time of making the amendment, it is as available as if the amendment were a new and independent suit. A cause of action created by the Federal Act is separate and distinct from a cause of action created by the law of a state or arising under the common law. Two wholly unconnected statutes imposing duties of different natures can no more constitute the basis of a single right of action than two unrelated contracts. It therefore follows that an amendment to a petition predicating liability solely upon the common law or upon the statute of a state, cannot be amended after the two year period of limitation so as to state facts constituting a cause of action under the federal act if proper and seasonable objection is made thereto."

The defense of the Statute of Limitations in the Federal Act has been generally held to constitute

a complete bar to the action except in cases when the original pleadings stated facts which alleged a cause of action under the Federal Act.

Here plaintiff has done the very thing that was condemned in the *Hughes case, Supra.* He turns to the Federal Statute in an emergency and seeks to change the action into one under that Statute.

The Trial Court erred in submitting the question of interstate commerce to the jury over the objection and exception of the defendant (Rec., p. 603) and in refusing to instruct the jury as requested at page 601, to which exception was taken (page 603). The defendant's motion for a nonsuit, page 258, should have been granted.

Distinguishing Cases Relied Upon by Respondent.

The cases cited by respondent in the court below as sustaining his contention that the cause of action under the Federal Employers' Liability Act is not barred by the statute of limitations, are all distinguishable from the case at bar.

In the case of *St. Louis, San Francisco & Texas Ry. Co. v. Maude Smith, as admrx., etc.*, 243 U. S. 630 (formerly Seale) cited by the plaintiff, the Court of Civil Appeals of Texas said, 171 S. W., page 513:

"The allegations in the last amendment, and to which the exceptions were leveled, are substantially, in fact almost literally the same as those in the second amendment, except in the last the widow of the deceased, M. T. Seale, having married again, and having been appointed administratrix of his estate, by leave of the court, as such representative made herself a party plaintiff in lieu of the original plaintiff. The last amendment did not set up a new cause of action under the provisions of the Federal Employers' Liability Act any more than did the second amendment. On the first appeal the case was affirmed but on writ of error to the Supreme Court of the United States it was reversed, because plaintiff was not capable of recovering in her individual capacity, 'but only through the deceased's personal representative'. Ry. Co. v. Maude Seale, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914C, 156.

The substitution of the personal representative of a deceased party is not the beginning of a new cause of action, but it relates back to the filing of the original petition.

We think the case of Railway Co. v. Wulf, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134, is decisive of this proposition."

This opinion was written after the reversal by this court of the case of *St. Louis, San Francisco & Texas Ry. Co. v. Seale*, 229 U. S., 156. When the case was first before this court the plaintiff had filed two amended petitions, both of which were filed within the two years. *Upon that trial it developed that the deceased and the defendant*

were engaged in interstate commerce at the time of the injury. The Supreme Court held that the evidence admitted of no other view than that the case was one within the Federal statute and reversed and remanded the case "for further proceedings not inconsistent with this opinion *but without prejudice to such rights as a personal representative of the deceased may have*". As the case then stood, interstate commerce having been proven upon the trial, it was a mere question of substituting the personal representative in the place of the individual, under the ruling of this court in the *Wulf* case.

Not only had interstate commerce been proven under the second amended petition before the case first went to the Supreme Court of the United States, but it is to be noted from the opinion of the Court of Civil Appeals of Texas that the third amended petition was almost identical with the second amended petition. Under these circumstances the fact that the Supreme Court affirmed the judgment of the Texas Court of Civil Appeals is not surprising and does not in any wise indicate that the court passed upon or considered the particular question involved in the Kinney case.

In Illinois Central R. R. Co. vs. Lannis, 246 U. S. 652, the defendant insisted that the action be brought within and be governed by the Federal Employers' Liability Act. The original petition

charged that the death of Lannis was caused by the negligence of the defendant and Timothy Carroll, its foreman. The defendant's answer, among other things, alleged that, in an action by the administratrix of Timothy Carroll against the same defendant because of said Carroll's death in the same accident, the United States District Court and the United States Circuit Court of Appeals had held that the liability of the defendant was to be measured by the Federal Employers' Liability Act, conferring the right of action upon the personal representative of the deceased, and filed a peremptory exception contending that the widow of Marshall Lannis had no cause of action in her individual capacity and that her suit should be dismissed. The exception was sustained.

The court said, page 5:

"On trial of the exception it was maintained and on the authority of the decision of the United States Supreme Court in the case of Missouri, Kansas & Texas Railroad Co. vs. Wulf, 226 U. S. 570 * * * * the court recognized the plaintiff's right to qualify as administratrix of the succession of her deceased husband and to amend her petition by appearing as the personal representative of the deceased, within the time specified in the judgment maintaining the defendant's exception.

The plaintiff then qualified as administratrix of the succession of her husband and filed a supplemental and amended petition in her capacity as administratrix and personal representative of her deceased husband, for

the benefit of herself and his only surviving child, a daughter of full age of majority. She repeated the allegations of her original petition as to her cause of action substantially as follows."

The court, after stating that it was not called upon to review the ruling that Lannis and the defendant were engaged in interstate commerce at the time of the accident, said, page 9:

"The plaintiff acquiesced in the ruling and does not question its correctness; and, as the ruling was made at the instance of the defendant's counsel, in behalf of the defendant, the latter is not in a position to dispute its correctness. See Wabash Railroad Co. v. Hayes, 234 U. S. 90, 34 Sup. Ct. 729, 58 L. Ed. 1230.

(1) The defendant's counsel insist upon the plea or exception that the supplemental petition changed the issues and set forth a new cause of action and that, therefore, it should not have been allowed. They contend that the cause of action set forth in the supplemental petition by the administratrix as personal representative of the deceased and for the benefit of his widow and daughter, under the Federal Employers' Liability Act, was entirely different from the cause of action alleged in the original petition by the widow in her individual capacity for her personal benefit, under the state statute.

We do not understand the contention to be that the statute or law under authority of which an action is brought is the cause of action. The argument is that the action commenced by the filing of the supplemental petition was a new and original action, not so much because it was instituted under au-

> thority of another statute than that under which the suit was originally brought, as because the supplemental petition was filed by the personal representative of the deceased for the benefit of his widow and daughter, whereas the original petition was filed by the widow in her individual capacity and for her benefit alone."

In the Lannis case, not only had the defendant pleaded interstate commerce in its answer, but the real objection to the amendment was the change from an individual capacity to a representative capacity by the plaintiff.

In *B. & O. R. R. Co. v. Smith,* 246 U. S. 653, the situation was identical with that presented in the Renn case. The Court of Appeals of Kentucky said (169 Ky. 611-612):

> "The remaining question is the sufficiency of the plea of limitation to bar a recovery. The accident resulting in the injury complained of occurred in 1909 and in March, 1911, within two years thereafter, the appellee brought this suit to recover damages. In his petition he alleged that the defendant company operated passenger and freight trains over its line of road in the States of Maryland, Virginia, Pennsylvania and elsewhere, and that at the time he received the injury complained of he was employed by it as a telegraph operator.
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> On the return of the case to the Trial Court the plaintiff filed an amended petition increasing the sum asked in damages, but not changing in any material way the nature of his cause of action as stated in his original

petition. Thereupon the railroad company filed an answer, setting up that at the time of the accident it was engaged in interstate commerce and the appellee was employed by it in such commerce, and pleaded and relied on the two year statute of limitation fixed in the Federal statute for the commencement of actions under the Employers' Liability Act.

* * * * * * *

The *original petition which was filed within two years* from the date of the accident, although it did not show specifically that the suit was brought under the Federal Act, *set up, as we think, facts showing that the railroad company was engaged in interstate commerce and that the appellee was employed by it in such commerce; and so we think that the original petition stated sufficiently a cause of action under the Federal Act.*" (Italics ours.)

In *Curtice v. Chicago & N. W. R. Co.*, (38 S. C. R. 578, 247 U. S. 510), the answer of the defendant, among other things, set up facts showing that at the time of the injury the plaintiff and defendant were engaged in interstate commerce, and that the cause of action, if any existed, was under the Federal Act and not under the laws of the State of Wisconsin.

In the court below (162 Wis. 421) Kerwin, J., in commenting upon this fact, said at page 426:

"There is another feature of this case which is worthy of notice. When the defendant answered the original complaint it set up the facts which were omitted in the plaintiff's defective complaint and necessary to

> perfect the cause of action under the Federal Act and which were afterwards set up by the plaintiff in the amendment complained of. The defendant was therefore in no way surprised or prejudiced by the amendment. Doubtless the case could have gone to trial on the pleadings as originally framed and the complaint on the trial amended in accordance with the issues made by the pleadings as originally framed."

Upon the reargument of the case (166 Wis. 594), the Wisconsin court recognized the fact that this court in the *Renn* case had by implication established a different rule but indicated that they were bound to adhere to their original decision irrespective of the Renn decision saying, page 598:

> "There are other considerations, however, which make it unnecessary to consider the question now. This court from very early times has held the doctrine that a proposition once decided by this court in a case becomes *res adjudicata* and the law of the case in its subsequent stages both in the lower courts and in this court."

Here the defendant did not plead the Federal Act as a defense to the original complaint. After the lapse of eight years, when all records are destroyed by which plaintiff's amendment might be disproved, it certainly cannot be said that the defendant was not prejudiced by the amendment. The cases are not at all similar.

In *Gainsville Midland Ry. Co. v. Vandiver*, 141 Ga., 350, the railway company filed a plea in

abatement, averring that it was engaged in commerce between the states at the time the plaintiff was alleged to have been injured, and that at the time of his alleged injury the plaintiff was an employee of the railroad company in the operation of its railroad conveying interstate freight and that the Federal Employers' Liability Act was the only act in force and that it superseded the Georgia statute.

The plaintiff and defendant then entered into the following stipulation of facts (page 351):

> "The train on which the plaintiff was working and firing the engine as fireman at the time of the alleged injury was pulling several solid freight cars from other states, loaded with freight from other states, which said defendant company had removed from connecting common carriers at Athens, Ga., for delivery at points in Georgia on the line of the defendant's railroad; and that said connecting carriers had brought said cars of freight in from other states and delivered same to the defendant company, the said defendant company having no line of its own extending out of the State of Georgia, but had physical connection with the Seaboard Air Line and the Central of Georgia, which lines do extend out of the State of Georgia into other adjacent states."

After this stipulation was made the plaintiff amended his petition by striking out the reference to the Georgia statutes and further amending by alleging facts showing interstate commerce over the objection of the defendant. The demurrer to

the petition as amended was filed and overruled. It does not appear that the statute of limitations was pleaded as a defense to the amended petition but simply raised by the demurrer. The stipulation, however was fatal to defendant's contention even if this question had been urged.

In *Vickery v. New London N. R. Co.*, 87 Conn., 634, 89 Atlantic 277, the original pleadings had no reference to the Federal statute. The accident happened September 5th, 1909. In January, 1913, while the pleadings were in the condition above stated, the plaintiff asked leave to amend his complaint by the addition of allegations showing that the defendants and the plaintiff were engaged in interstate commerce at the time of the injury. *The leave to amend was refused upon the ground that an allowance of the amendment would result in the bringing of a new cause of action and one which had been lost to the plaintiff by statutory limitation.* The defendants thereupon added to the two defenses already filed a third, in which they alleged interstate commerce. The allegations of this new defense were admitted. In this condition of the pleadings the case came to trial to the jury. The court refused to charge the jury, as requested by the defendants, that if it should find that at the time of the injury the Central of Vermont Railway was engaged in interstate commerce and plaintiff was employed by it in interstate commerce that the defendants were entitled to a verdict.

The court, after referring to the amendment by the defendant setting up interstate commerce and the admission of these facts by the plaintiff, said:

> "The admitted allegations of the third defense, however, brought the pertinent facts upon the record and supplied the absence of them in the complaint.
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> * * * * * * * *
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> Under its application the complaint, defective though it was for lack of allegation of material facts, had its defects in that respect cured and the missing allegations supplied by other subsequent averment by the defendants and admission by the plaintiff."

In *Jorgesen v. Grand Rapids, etc., R. Co.*, 189 Mich., 537, the original complaint stated a cause of action under the Federal statute, the court saying, pages 539-540:

> "But the original declaration in this case averred that the defendant owned at the time of the injury and was operating a railway system extending through the States of Michigan and Indiana, and that the decedent was employed by it in the construction, repairing and maintaining of the roadbed of such railway. This amounted to an allegation that the defendant was engaged in interstate commerce and that the decedent was employed by it in such commerce."

In *Bird v. Ft. Worth & R. G. Co.*, 207 S. W., 518, the amendment was permitted after the appointment of an administratrix and the decision hinged largely upon the court's holding that the cause of action given by the Federal Employers'

Liability Act in case of death did not accrue until the appointment of a personal representative of the deceased and that in the *Bird* case the administratrix filed her amended petition within two years from the date of her appointment.

In *Nashville C. & St. L. Ry. Co. v. Anderson*, 134 Tenn. 666, the court said, pages 675-676:

> "This plea of the railway company was filed seven months after the accident occurred. The declaration stated acts of negligence cognizable under the Federal Employers' Liability statute. The only point of the plea was that the suit was not brought in the name of the administrator. The suit was not barred at that time. The Georgia statute had been repealed as to employees in interstate service and the declaration stated a good cause of action under the Act of Congress, except that it failed to aver the interstate character of deceased's service. This was admitted by the plea. The sole effect of the special plea referred to was to bar the prosecution of the suit in the name of the widow. This plea set out as a fact that deceased was employed in interstate commerce at the time of his death and challenged the suit in the name of the widow. The plea would not have been good unless such fact had been made to appear. Such fact having been admitted by the administrator and the railway company having obtained the benefit of this admission and having procured a reversal of the former judgment against it on the strength of the plea, it would be inadmissible at this time to hold that the interstate nature of deceased's employment was not sufficiently brought out in the pleadings

prior to the running of the two year statute. This court long ago announced the rule that matters of substance omitted from a declaration might be cured by a plea."

In *Ferguson v. B. R. & P. R. R. Co.*, 176 App. Div., 897, there was involved merely the question of the dismissal of the action for failure to prosecute and that the reason assigned in defense of the motion was that plaintiff's attorney was not sure whether the cause of action was one under the Federal statute or under the state statute.

In *Seaboard Air Line Ry. Co. v. Koennecke*, 239 U. S., 352, the trial court found from the evidence that the plaintiff was engaged in interstate commerce. No question of amendment was argued in this court. The Trial Court left it to counsel to say whether he was surprised by the amendment, and counsel not being willing to say so, although saying he was not prepared on the question of dependency, the court ordered the trial to proceed. It was merely urged in this court as an error that the requirement was contrary to the fourteenth amendment.

In *Payne v. N. Y. S. & W. R. R. Co.*, 201 N. Y., 436, the exclusive character of the Federal act was not disclosed. It was assumed in the opinion that the two statutes were supplemental to the common law remedy and to each other. Since the Payne case was decided the main decisions of the Federal Court cited in our main brief held that

the Federal Act does create a new and distinct cause of action.

In *Norton vs. Erie R. Co.*, 157 A. D., 899, the original complaint alleged that the defendant operated and owned a railway extending throughout the State of New York and other states, and that plaintiff's intestate was employed by it as a switchman.

Smith vs. Atlantic Coast Line R. Co., 210 Fed. Rep., 761, is the only case cited by plaintiff which seems to sustain his contention. This decision is in conflict with many, if not all of the authorities cited to sustain petitioner's contention, and has not been generally followed. Clearly it was overruled by the decision of this court in the *Renn* case.

It will be observed that all the other cases relied upon by plaintiff are cases where either the defendant in its answer set up interstate commerce and proved it upon the trial; where the original petitions stated a cause of action under the Federal statute, or where the question of amendment was one solely of substitution of the personal representatives in place of the individual.

This case is distinguishable from all such decisions.

That an admission in the complaint can be cured by an allegation in the answer was specifically stated in *Texas & New Orleans R. R. Co. v. Miller*, 221 U. S., 408. The court said at page 416:

> "Of the ruling that the defect in the complaint was cured by the answers little need be said. While recognizing that the right created by the Louisiana statute was qualified by the one year limitation and that the Texas courts could not disregard the qualification without impinging upon the full faith and credit clause of the Constitution, we think the claim that they did disregard it is quite untenable. The action was begun within the time prescribed, and what the Texas courts really held was that the omission from the complaint of an essential allegation was cured by its inclusion in the answers. In so holding they but gave effect to a generally recognized rule upon the subject. United States v. Morris, 10 Wheat, 246, 286."

In the Kinney case for eight years there was not a suggestion of the application of the Federal Statute, and no facts were alleged either in the original complaint, or the original answer from which interstate commerce could be inferred. Upon none of the trials was there the slightest proof of Kinney's engagement in interstate commerce. Obviously, and admittedly there was no intention to invoke the Federal Act.

We respectfully and urgently insist that, under the facts disclosed in this Record, Section 6 of the Federal Employers' Liability Act operates as an

absolute bar to the maintenance of this action under that act.

POINT II.

The plaintiff failed to establish by any evidence that he was engaged in interstate commerce at the time of the accident. The court erred in refusing to instruct a verdict for the defendant under the Federal Act to which exception was duly taken (Rec., pp. 550, 551, 258) and erred in refusing to charge the jury that there was no evidence from which the jury could find that plaintiff was engaged in interstate commerce to which exception was duly taken (Rec., p. 601).

This trial started January 27, 1919, more than 10 years after the accident occurred. Plaintiff attempted to prove that the "Fence track" from which Kinney was eventually going to get some cars, was on October 12, 1908, used exclusively for interstate cars, cars coming from or going to Canada.

Shultis, a witness sworn by plaintiff merely testified that the cars he from time to time took off this track had either come from or were going to Canada. He admitted that he had no knowledge as to the character of the cars on the "Fence" track the night Kinney was injured. (Rec., p. 31.)

Sometimes he would not be in this yard for two or three days. He admitted that he could not tell whether this track was used for any other purpose than interchange between the Michigan Central and the New York Central (Rec., pp. 26, 27), and he also admitted that it might have been used for other purposes. (Rec., pp. 31, 32). He admitted that New York Central cars might have been put on this track and that during the times he was not there he could not tell the origin of the cars put upon this track or where they came from or went to. (Rec., p. 31).

This witness was also permitted to testify over the objection and exceptions of defendant that the Michigan Central maintained the tracks. (Rec., p. 28). He admitted that the repairs were made by New York Central men and that he did not know what percentage of the repairs the Michigan Central paid. His testimony in this respect, obviously was prompted because he had sent certain bills for maintenance of these tracks to the Michigan Central (Rec., pp. 30, 31).

It developed later from the testimony of Samuel Mann, division accountant for the defendant for 20 years that the Michigan Central paid only the proportion of the expense of these tracks which the number of cars handled on this account bore to the total number of cars handled in the yard, the approximate estimate of which was from 8 to 9 per cent. (Rec., p. 475).

Mullen, government inspector at the International bridge, testified that the number of cars coming into this yard was slightly in excess of 1,000 a day and the number going out was from 1,100 to 1,200. That about ⅓ or 30 per cent of these cars represented Michigan Central business. The witness did not profess to know anything about the use of this yard generally or on the night of the accident. (Rec., pp. 32, 33).

Doud's testimony (Rec., p. 33), fails to establish that these tracks were used exclusively for interchange with the Michigan Central on October 12, 1908, or at any other time. In 1908 this witness was yardmaster at East Buffalo in the V. I. yard (Rec., p. 38) and it was only on rare occasions when there would be no business for him as yardmaster that he went back to his work as yard conductor. (Rec., p. 38). He was mistaken in his testimony that in 1908 he was yard conductor and ran in and out of this yard. He knew nothing of the character of the cars on the "Fence" track on October 12, 1908, in fact he could not say that he was in the yard at all during that month (Rec., pp. 37, 38).

He further testified, Record, p. 37:

> "Q. And you don't know what these tracks were used for, or what cars were there on the fence track or these other tracks you have spoken of, October 12, 1908, do you?
>
> A. No, as a matter of fact I don't, not on those dates, I wasn't sure, I couldn't tell.

Q. *So that there might have been either intrastate or interstate cars on those tracks without your knowledge?*

A. *It could have been possible; yes, sir.*"

Barry, a former Central brakeman, discharged for drinking while on duty (Rec., p. 41), says that during 1907 and 1908 these tracks were used only for interchange of cars between the New York Central and the Michigan Central. He admits that he only worked there off and on during these years (Rec., p. 41). He could not tell what they were used for when he was not there. He did not know what cars were on the fence track on the night of the accident, whether they were interstate or intrastate (Rec., p. 42).

Plaintiff's knowledge of the use of these tracks was confined entirely to his occasional work there as a switching or road engineer (Rec., p. 49). He knew nothing about the use of these tracks, or the cars on the same, the night of the accident (Rec., p. 114).

We submit that the vague, indefinite testimony of plaintiff's witnesses failed absolutely to establish that these tracks were used exclusively as interchange tracks or that the train on the fence track on the night of the accident was interstate in whole or in part.

Defendant's witness Brodie, former yardmaster and at the time of the trial a yard conductor, testi-

fied that prior to the accident the fence track was used for both intrastate and interstate traffic (Rec., p. 469). That there were times when the cars on this track were intrastate cars (Rec., p. 471). That there were other tracks on which trains for Canada were placed and that these tracks were not in daily use for the receipt of cars for Canada (Rec., p. 470). He could not tell, of course, what cars were on the fence track on October 12, 1908.

Defendant's witness Bronson was not in its employ at the time of the trial. He was the defendant's yardmaster at Black Rock in 1908, and from 1901 to 1910 was employed in and about this yard as clerk, car checker, yard brakeman and conductor, and was familiar with the fence track (Rec., p. 435). He says the fence track was used at times for intrastate cars, at times for interstate cars, and at times for mixed trains, (Rec., p. 435). He did not know what was on the track the night of October 12, 1908.

Mann, in addition to testifying as to the division of the expense of maintenance before referred to, testified (Rec., pp. 477, 478):

> "Q. And there were a large number of cars that were local cars from the industrial plants there and from Buffalo, that were made up there in that yard and taken to East Buffalo at points solely within the state?
>
> * * * *
>
> A. Yes."

Dehm, sworn by defendant, had been employed in this yard as general yardmaster since 1889. He was familiar with the fence track and testified that it was not assigned for any particular purpose (Rec., p. 478). That it was used both for intrastate and interstate and mixed cars (Rec., p. 479). Dehn also testified that the record of the trains on the fence track on the night of the accident had been destroyed by direction of the Interstate Commerce Commission under the act of June 8, 1914. That records were retained for only six years and after that destroyed (Rec., p. 479).

Conductor Mattern, who was in charge of th movements of the engine and cars on the night of the accident to plaintiff (Rec., p. 325), *testified that the train on the fence track consisted of empty gondolas or empty box cars* (Rec., p. 329).

We submit that upon all of the evidence in the case it was disclosed that these tracks, and particularly the fence track, was not used exclusively for interstate cars. No witness in the case was able to tell the character of the cars on this track on the night of the accident. It did appear, however, that the train consisted entirely of empty cars. Such being the case, even if the cars had come from Canada, after delivery and unloading their interstate character ceased. Merely showing that they were to be hauled from the Black Rock yards to East Buffalo was not sufficient to establish interstate commerce.

The records of this train had been destroyed long before plaintiff asserted any claim under the Federal statute, so that the defendant's inability to produce the records certainly should not militate against it.

We submit that the special finding of the jury (Rec., p. 604) was arrived at by pure speculation and guesswork, and that there is no evidence in the case to sustain it.

The real test under the Federal Employers' Liability Act is whether the employe was engaged in interstate commerce at the precise time of the accident.

In *Osborne v. Gray*, 241 U. S., 16, the Supreme Court said, page 21:

> "The make-up of trains and the movement of cars are not matters which we may assume to know without evidence."

In *Erie R. R. Co. v. Welsh*, 242 U. S., 303, the Supreme Court said at page 306:

> "By the terms of the Employers' Liability Act the true test is the nature of the work being done at the time of the injury and the mere expectation that plaintiff would presently be called upon to perform a task in interstate commerce is not sufficient to bring the case within the act."

In *Lucchetti v. Philadelphia & R. Ry. Co.*, 233 Fed., 137, Dickinson, District Judge, said, pages 137-138:

> "It is essential to know under the statutes of the United States, not only that the defendant was at the time engaged in interstate commerce, but also (as the fact might be the defendant was likewise engaged in transportation within the state) that the plaintiff was, at the time the cause of action arose, employed in interstate commerce work. This is settled beyond the necessity of the citation of authorities laying down the ruling."

The defendant's counsel requested the Trial Court to charge the jury (Rec., p. 601):

> "That there is no evidence in the case from which the jury can find that the plaintiff was engaged in interstate commerce at the time of the accident,"

which was refused and an exception taken.

Defendant also moved for a nonsuit on this ground at the close of the plaintiff's case (Rec., p. 258) which was denied and an exception taken. At the close of all the evidence the court was requested to direct a verdict for the defendant upon the same ground (Rec., p. 550), which was refused and an exception taken. (Rec., p. 551). An exception was also taken to the submission of this question to the jury. (Rec., p. 603).

We respectfully urge that the plaintiff utterly failed to establish the engagement of the plaintiff in interstate commerce. The verdict was the result of speculation and guess work and is not sustained by any probative evidence in the Record.

POINT III.

The Trial Court erred in charging the jury as requested by plaintiffs' counsel (Rec. p. 593) and also in its main charge to the jury (Rec. p. 585), to which exception was taken (Rec. p. 593).

"Mr. Ward: I withdraw the fifth. Your Honor has covered that.

The Court: The fifth is withdrawn. I have granted, 'If the Federal Employers' Liability Act applies, the case must be determined according to the law controlled by it, and in that case it is a question of fact for the jury to determine whether Kinney assumed the risk inherent in his employment, and also of the negligence of the defendant or of a fellow servant, if such risk is shown by defendant to have been known by plaintiff, or if it was so obvious that it must be presumed that a person of ordinary prudence would have known it.'

I think that was embodied in my general charge.

Mr. Spratt: I except to that.

Mr. Ward: I withdraw that request, and I don't ask your Honor to pass on it. That one you have just read I withdraw."

The court had previously charged the jury in the precise language of this request (Rec., p. 585):

"The burden of proving assumption of risk by the plaintiff also rests on the defendant and it is a question of fact for you to determine whether the plaintiff assumed the risk inherent in his employment, and also of the negligence of the defendant or of a fellow servant, if such risk is shown by the defend-

> ant to have been known by the plaintiff, or if it were so obvious that it must be presumed that a person of ordinary prudence would have known it."

This was not an offhand request made by counsel at the close of the charge of the Trial Court. The request, among others, had been carefully prepared by Mr. Ward and submitted to the court in advance of the main charge, in conformity to the request of the presiding judge (Rec., p. 551). The request as prepared by Mr. Ward was followed word for word in the main charge of the court (Rec., p. 585). It is true that Mr. Ward attempted to withdraw the request and we are not surprised at his effort to do so, when the seriousness of the error is considered. Mr. Ward, however, did not request the withdrawal of what had been charged in main, nor did the court treat the same as withdrawn as appears from the colloquy which took place:

> "Mr. Ward: I withdraw the fifth. *Your Honor has covered that.*
>
> The Court: The fifth is withdrawn. *I have granted.*"

and the court then proceeded to read the entire request to the jury, following the same by the statement:

> "I think that was embodied in my general charge." (Rec., p. 593).

We submit that, not only did the Trial Court reiterate the charge in main but the request was not in fact or effect withdrawn, and the error was twice committed and emphasized to the jury. If,

however, this court is of the opinion that the withdrawal of the request was effected, then we urge that the court should in view of the statements of the Trial Court, regard the reading of the request, as a repetition and re-statement of the main charge, to which the exception of the defendant certainly is availing.

Respondent's counsel below devoted pages of brief to explain this charge to the Appellate Division, and the Court of Appeals at the same time asserting that its meaning was plain to the jury.

We direct this court's attention to certain statements in plaintiff's brief filed in the Appellate Division.

On page 45, he said:

> "The particular request that the defendant complains of was withdrawn before the jury, *but even if it had not been withdrawn, there was no error in it.*" (Italics ours).

and at page 46, referring to the main charge, he says:

> "The court then *properly charged* the language of the withdrawn request *which was the reason for the withdrawal.*" (Italics ours).

And at page 47:

> "*It is true that the language* of the withdrawn request *is not as clear and plain as might be desired,* and that is one reason why it was withdrawn."

We confidently assert that this charge, either in main or as requested, was absolute error and that it misstated long established principles of assumption of risk. *It permitted the jury to usurp the functions of the court.* If, as admitted by respondent's counsel, the charge was not as clear and plain as might be desired, then it cannot be said that the rights of this defendant were not prejudiced, for the jury may not have construed the charge the same way as the learned counsel who prepared it, and who admits that it is not clear and plain.

Under the Federal statute the defense of assumed risk has its former common law effect as a complete bar to the action.

Seaboard Air Line vs. Horton, 233 U. S., 492.

If we have any conception of the English language the charge as made and repeated left it to the jury to determine as questions of fact:

1. Whether the plaintiff assumed the risk inherent in his employment.

2. Whether he assumed the risk of negligence of the defendant or a fellow servant, if such risk was shown by the defendant to have been known by plaintiff.

3. Whether he assumed the risk of the negligence of the defendant or of a fellow servant, if

such risk was so obvious that it must be presumed that a person of ordinary prudence would have known it.

The decisions uniformly hold that under each of the conditions above stated the employee assumes the risk as matter of law.

It was the contention of the defendant that the engine which Kinney was using was in proper condition for service when he took it out. That the piston rod had just been repacked and that there was no cut on the piston rod as claimed by the plaintiff (Rec., pp. 420, 422, 425, 426). That there was no defect which required the engine to be taken out of service (See Exhibits 7, 8, 9 appended to the Record) and Carroll's testimony (Rec., pp. 168-177). Every witness sworn, conceded that it was a common thing for piston packing to go wrong and that this might happen at any time or place and frequently very soon after the packing had been repaired or new packing put in (Rec., p. 192). Also that old packing was better than new. It was also conceded that, if the engine commenced to leak steam after it was taken out, the engineer had a perfect right to turn it in or sidetrack it and send for another engine and that it was his duty to do so if in his judgment the occasion required it (Rec., pp. 180-182, 193, 199). On Kinney's own admissions the jury could have found that the steam interfered with his view of signals on his first trip to Tonawanda, that it was

getting worse all the time (Rec., pp. 101, 102) and would particularly interfere with his view of dwarf signals in his movement around the "Y" after dark (Rec., pp. 81-87). He came right by the old round house where the engine could have been repaired, but he did not turn it in or even report its condition (Rec., p. 86).

One of the risks inherent in Kinney's employment was that a proper engine might commence to leak steam while on a trip. He certainly assumed the risk of continuing to use the steamy engine under the conditions testified to by him upon the trial. He knew that the dwarf signal was the signal which he must follow, if he could see it. He could have shut off the steam or stopped his engine within from 2 to 4 feet, and been absolutely sure of the dwarf signal before he passed it. He knew that two main line passenger trains were due to pass tower 55 at the precise time he would reach the main line tracks. He admitted that the signal might be changed before he passed it, even it he had seen it green when at Hertel avenue. He knew that he must be absolutely sure of his signals around an interlocking plant and on a movement against the current of traffic. He knew that he was proceeding into a position of grave, potential danger, not only to himself but to hundreds of passengers on the main line trains. He assumed, however, to utterly disregard the fixed and controlling signal and to rely entirely on the hand signal of Mullen.

"Q. Did you pay any attention to the dwarf signal at all after you saw it at the point you described before you passed Hertel avenue, between the words 'the' and 'current'?

A. No particular attention.

Q. *Did you pay any attention to it?*

A. *No, sir.*

Q. *So that you relied wholly on Mullen, did you?*

A. *Yes, sir.*" (Rec., p. 96).

The jury also had a right to find that the steam which absolutely hid the dwarf signal from Kinney for a distance of over 500 feet, also interfered, to the knowledge of Kinney, with Mullen's signals, and that although Mullen gave the stop signal, Kinney did not so read it because of the escaping steam.

Kinney testified, Record, p. 127:

"The Court: He asks you now definitely whether or not this steam obscured your seeing those signals, and you can say yes or no.

A. *No, not wholly.*

Q. Did they to some extent?

A. *To some extent, yes.*"

and at page 248:

"Q. Now, didn't the steam to some extent, interfere with your seeing Mullen's signals in going from tower I to where the accident occurred?

A. *It might have to some extent.*

Q. Didn't it, and didn't you testify that it did on the second trial at pages 154 and 155?

A. I can't answer your question.

Q. You can't answer that?
A. No.
Q. (Reading) 'Q. Now, did the steam interfere with your taking Mullen's signals?
A. *To some extent, it did.*' Is that true?
A. *Yes, sir.*''

Kinney admits that he didn't see the down finish of any of Mullen's signals (Rec., p. 242).

It was a fair question for the jury as to whether or not the escaping steam did not obscure the down finish of Mullen's signals, rather than that the light went behind the caboose. *If Mullen gave the stop signal but Kinney failed to properly read it because of the escaping steam then we assert that this was one of the risks incident to his employment, which he assumed as a matter of law. Certainly if the steamy condition of this engine developed after Kinney took it out, he assumed as a matter of law, the risk of any injury resulting from its continued use.*

If on the other hand, the engine was leaking steam from almost every conceivable part when Kinney took it out as claimed by him (Rec., pp. 80-82), he knew, as only an experienced engineer could know, the risks and hazards attending its use in the steamy condition. The negligence of the defendant was better known to him than to the defendant itself. He admits that it was his right as an engineer to inspect the work done before he took it out and if anything was wrong to have it corrected (Rec., p. 107). He was not re-

quired to take the engine out unless it was satisfactory to him but could demand another engine (Rec., pp. 193, 199, 180, 182). Certainly, under such conditions, it must be said that Kinney assumed all risk of injury, due to the use by him of the defective, steamy engine. If the steam prevented his seeing the dwarf or interfered with Mullen's signals so that Kinney misinterpreted them, in either event, he should shoulder the results.

If, as claimed by Kinney, the engine was steaming from various parts when he took it out, the risk was not a "sudden and unexpected one" as claimed by respondent in the court below. The risk was present the very moment he entered the cab and continued down to the moment of the accident.

On the other hand, if the defect developed after he took the engine out, the risk commenced from the time he discovered the condition, increasing, perhaps, with the increased escape of steam, the darkness, and the position of grave, potential danger into which he knew he was going. One move of the throttle and the situation would have cleared. He could have seen the dwarf light. Mullen's signal would have been clear, in fact he could have then disregarded Mullen's signal entirely, and obeyed the dwarf signal, which if seen was absolutely controlling. He assumed, however, the risk of running his engine blindly

through the steam, and should be held responsible for the results.

We submit that this charge presents serious error. If its plain meaning was followed by the jury, and we must assume it was, then the jury may have found that these risks were inherent in and incident to Kinney's employment or well-known and appreciated by him and yet have determined as a matter of fact, that they were not assumed by Kinney.

POINT IV.

Prejudicial error was committed by the Trial Court in its charge to the jury at Record p. 585 and also in charging as requested at Record p. 593, to which exception was taken, page 593.

The court charged the jury (Rec., p. 585):

> "The plaintiff can not be charged with the assumption of the risk arising from the defective engine, and from the steam escaping for that reason, unless the defect and the danger arising therefrom were both known to him or were so obvious that it must be determined that they would be observed and known by a person of ordinary prudence; *and even if the plaintiff knew of the defects in the engine when he started, or discovered them while en route on his trip, he can not be charged with assumption of risks unless he knew and appreciated the particular danger arising therefrom in the obstruction*

of his vision, and preventing him from seeing the dwarf signal at the critical moment of the accident, or as he approached the dwarf, or unless such danger was so obvious that a person of ordinary prudence must be presumed to have known and appreciated it.

And gentlemen of the jury, it is for you to consider in that behalf any evidence of the escaping steam previous to the time the plaintiff was approaching the dwarf, and whether it obscured his vision or prevented him from seeing the signals." (Italics ours.)

The court, at the request of plaintiff's counsel repeated the charge again (Rec., p. 593):

"The Court: I guess there is some mistake here. The seventh does not appear on this list. It doesn't make any difference what its number is, this has been requested, and I will charge it, that 'even if Kinney knew of the defects in the engine when he started, or discovered them while en route on his trip, he cannot be charged with assumption of risk, unless he knew and appreciated the particular danger arising therefrom in the obstruction of his vision, and preventing him from seeing the dwarf signal *at the critical moment of the accident,* or as he approached said dwarf, or unless such danger was so obvious that a person of ordinary prudence must be presumed to have known and appreciated it.' And in that behalf, any evidence that the escaping steam previous to the time that he was approaching the dwarf, did not obscure his vision or prevent him from seeing signals, should be considered by the jury. (Italics ours).

That is already in the charge. That is embodied in the charge.

Mr. Spratt: I except to that.

Mr. Ward: I withdraw that particular request because I think your Honor covered it.

The Court: You withdraw it now as a request? I have covered it.

Mr. Spratt: I except to the withdrawal after it has been read and I except to that as charged in the main charge.

The Court: I had only repeated what I already charged. Which do you wish to except to, what I charged in the main charge? Now that this is withdrawn it does not make any difference.

Mr. Spratt: What you charged in the main charge.

The Court: Yes, certainly, you may have an exception to that." (Italics ours).

The court will observe that plaintiff's counsel made no attempt to withdraw this request until the same had been read in full and re-charged by the Trial Court. It is also obvious that the charge in main was taken word for word from the request as prepared and submitted by Mr. Ward. The error was therefore, twice committed, and emphasized to the jury. The defendant's exception goes not only to the charge in main but to the charge as requested.

If an employee is not to be charged with assumption of risk unless he knew and appreciated the *particular* danger at the *critical moment of the accident* then the defense of assumption of risk is a farce, in fact there is, under the common law, no such defense. The "critical moment of

the accident" means the happening of the accident.

We again urge that when Kinney entered the employment of this defendant as engineer he knew from practical railroad experience that an engine in proper condition might become defective en route, or, to get down to the situation here involved, that the piston packing or some other part of the engine might give way causing steam to escape. This was one of the risks ordinarily incident to his employment, as is conceded by every witness. When such defects developed he had the absolute right to abandon the engine. He was in control. No one could better appreciate than he, the risk and danger of continuing to use the engine with the steam escaping sufficiently to absolutely obscure his vision of the fixed signals and to also interfere with the hand signals of the brakeman. Is the accident the test of his assumption of risk as in effect charged by the court? Certainly not. The accident is the result of his continuing to run the engine under known and obviously dangerous conditions.

If on the other hand, he knew of the defects before he took the engine out, as testified to by him, must we follow him, an engineer of long experience, down to the *critical moment of the accident*, to the accident itself, before he is chargeable with the risk? The question answers itself. No such rule has ever been announced by this court.

The vice of this charge is emphasized when the court considers that the jury found that Kinney was guilty of contributory negligence, such finding being undoubtedly based on Kinney's admission that he utterly disregarded the dwarf signal because of the escaping steam, and yet they absolve him, under this erroneous charge, from the assumption of the risk. (See Seaboard Air Line vs. Horton, 233 U. S., 508).

In *Arizona Employers' Liability Cases,* 250 U. S., 400-421, the rule of assumed risk under the common law was plainly stated. Mr. Justice Pitney, delivering the opinion of the court, said at page 421:

> "The rule existing in the absence of statute, as usually enunciated, is that all consequences of risk inherent in the occupation and normally incident to it are assumed by the employee and afford no ground of action by him or those claiming under him, in the absence of negligence by the employer; and even risks arising from or increased by the failure of the employer to take the care that he ought to take for the employee's safety are assumed by the latter if he is aware of them or if they are so obvious that any ordinarily prudent person under the circumstances could not fail to observe and appreciate them; but if the employee, having become aware of a risk arising out of a defect attributable to the employer's negligence, makes complaint or objection and obtains a promise of reparation, the common law brings into play a new set of regulations, requiring the employer to assume the risk un-

der certain circumstances, the employee under others. *Seaboard Air Line Ry. v. Horton*, 233 U. S., 492, 504, 505; 239 U. S., 595, 598, 599; and cases cited."

In *Southern Pacific Company v. W. S. Berkshire*, decided at the October term, 1920, of the Supreme Court of the United States, and not yet reported, that court said:

"But an experienced railroad man cannot be supposed to have been ignorant that such a projection threatened danger and, knowing so much, he assumed the risk that obviously would attend taking the chances of leaning well out from the train."

In *Seaboard Air Line v. Horton*, 233 U. S., 492, the Supreme Court said, page 504:

"Some employments are necessarily fraught with danger to the workman—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them.

* * * * *

"When the employee does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment, without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employee assumes the risk, even though it arise out of the master's breach of duty."

We know of no authority which holds that the test of assumption of risk is the knowledge and appreciation of the *particular danger* at the *critical moment of the accident*, as charged by the Trial Court. We respectfully urge that the error complained of was so serious and prejudicial that it compels a reversal of this judgment.

POINT V.

The Trial Court erred in refusing to charge the jury as requested by defendant's counsel at Record p. 600, to which exception was taken, at page 600.

"The Court: Yes. The twenty-first, that I have also modified. I will charge as modified and will first read the charge as requested 'That if the plaintiff had notice on his first trip to Tonawanda that the escape of steam from the engine would interfere with his taking dwarf signals, and he did not exercise his privilege of sidetracking his engine, or securing another engine on his return to East Buffalo, but started on his trip to Black Rock, that he assumed the risk of the con-

tinued leaking of steam at the time of the accident.'

That I will find as requested with this modification that if Kinney knew of the defects in the engine when he started or discovered them while en route on his trip, he cannot be charged with assumption of risk unless he knew and appreciated the particular danger arising therefrom in the obstruction of his vision in preventing him from seeing the dwarf signal at the critical moment of the accident, or as he approached the dwarf, or unless such danger was so obvious that a person of ordinary prudence must be presumed to have known and appreciated it and in that behalf any evidence that the escaping steam previous to the time that he was approaching the dwarf did not obscure his vision or prevent him from seeing the signals, should be considered by the jury.

Mr. Spratt: An exception to the refusal of the court to charge as requested."

There is involved here not only the error in refusing to charge as requested but the same error called to the court's attention under Point IV is repeated. The request made assumed all of the essentials upon which the jury might have found that Kinney assumed the risk attendant upon the continued use of the steaming engine. The jury found that Kinney was guilty of contributory negligence, this finding without doubt being based on Kinney's admission that he utterly disregarded the fixed dwarf signal because of the steam, and his further admissions that the escaping steam to some extent interfered with Mullen's signals.

This court in discussing the refusal of the court to instruct as requested on the assumption of risk said in Seaboard Air Line vs. Horton, 233 U. S., 492, 508:

"Its harmful effect is conspicuously evident when we note that the jury, while finding that plaintiff did not assume the risk, at the same time found that he did by his own negligence contribute to his injury. Presumably, if instructed in the manner requested by defendant the jury would have found that the risk was assumed, and this would have entitled defendant to a judgment in its favor, instead of a mere mitigation of the damages, which was the consequence of a finding of contributory negligence."

See also the argument under Point III.

POINT VI.

The Trial Court erred in charging the jury as requested by plaintiff's counsel at page 595 of the Record.

"The Court: 'If Kinney saw the dwarf signal showing green at, or as he approached Hertel avenue, he had the right to proceed, and if such light remained until after Kinney reached a point where he could not see it and it were afterwards changed by the towerman to purple, the jury can find that Kinney was not chargeable with contributory negligence, unless he received from Mullen a signal which Kinney understood to be a stop signal, in time for Kinney to avoid the accident by stopping his engine.' That you want an exception to, I suppose?

Mr. Spratt: Yes, certainly.
The Court: You may have it."

The jury had a right to find and may have found that Kinney paid no attention to the dwarf signal after he saw it when south of Hertel avenue but that for a distance of 500 feet or more and down to the time of the accident he relied solely on Mullen's hand signals (Rec., p. 96).

The most sharply disputed question in the case was whether Mullen's signals, for a considerable distance before the dwarf was reached, were stop signals or come ahead signals.

It appears in the record that on some trials Kinney testified he tried to stop because Mullen's signals became uncertain, on others because he received a stop signal, and on this trial because Mullen gave him a faster come ahead signal. (Rec., pp. 251, 127).

If he were uncertain of the signal given by Mullen, he was as much compelled to stop as if he had actually seen the purple light on the dwarf.

The jury could have found on the evidence, that Kinney became uncertain of Mullen's signals in ample time to stop and avoid the accident, and yet under this instruction of the court they could not charge him with contributory negligence. They could also have found, on the overwhelming evi-

dence in the case that Mullen gave proper stop signals which Kinney should have recognized as such in time to stop and avoid the accident, and still under this charge they were bound to absolve him from contributory negligence if he misinterpreted the signals. If he was uncertain of Mullen's signals it was his duty to stop. If Mullen gave proper stop signals in time for Kinney to stop, then Kinney's failure to understand them as such and stop was not only contributory negligence but such negligence was the sole cause of the accident. Relying on Mullen's signals absolutely, as Kinney claimed he was, he was compelled, at his peril, to be absolutely sure of the signals given. *To absolve Kinney from negligence because he may have misunderstood a signal properly conveyed to him by Mullen presents the most grievous error conceivable.* This error calls for a reversal of the judgment.

See also the argument under the next point.

POINT VII.

The Trial Court erred in charging the jury as requested by plaintiff at page 596 of the Record.

"Regardless of whether Mullen was attempting to give a proceed or a stop signal, Kinney cannot be charged with contributory negligence for not stopping his engine before he had reached the point where it was impossible to stop it in time to prevent the

accident, unless he, from his position, had reasonable ground to doubt whether the signal was a proceed or a stop signal. And in that behalf the jury should consider the evidence that is claimed by Kinney that he saw the dwarf signal as showing green at the last time it was possible for him to see it. That he knew the switches could not be changed until he stopped, and that Mullen stood in such a position behind the caboose from Kinney, so that the signal Mullen was giving, even if it were intended by Mullen to be a stop signal, showed to Kinney only as a proceed signal, and that Mullen maintained his position behind the caboose while giving such signal.

Mr. Spratt: Exception."

This charge means simply that if Mullen was giving plain certain stop signals Kinney was not chargeable with contributory negligence if he did not so interpret them. If Mullen's signals were stop signals and every witness who saw them, except Kinney, says they were, then Kinney was bound to recognize them as such and obey them. If he read a plain stop signal as a come ahead signal the negligence was certainly his, not Mullen's. He was depending absolutely on Mullen, (Rec., p. 96). The court could with equal propriety have charged the jury that if the dwarf signal was at danger, but Kinney, being able to see it, believed it to be clear that he was not guilty of contributory negligence. It was not a case of reasonable doubt as to what the signals were. It was a case of knowing positively what signals

were shown or given. If the steam caused him to misread the signal, then as before urged he not only assumed the risk, but was guilty of negligence. In discussing Kinney's failure to observe the dwarf signal the Court of Appeals said, (217 N. Y., 330):

> "I do not think that the escape of some extra steam tending to obscure his vision would be such a reason for relieving him from seeing the signal as he passed over the space of 400 or 500 feet between it and Hertel avenue. His movements were not controlled by any emergency. His engine was not moving on any schedule. It was going at a rate of only seven miles an hour. It was light and he could have stopped in a few feet. It would have been a very simple matter to have stopped or slackened his speed if necessary as he passed the signal in order to observe its light. An engineer moving his engine into a position where if wrong he might endanger not only his own life but the lives of hundreds of others, ought not to be excused from the performance of some very important duty in the interest of safety by some inconsequential obstacle. Therefore, if the duty had rested solely upon plaintiff of reading the signal, I think the escape of steam would not have excused him and that he would have been guilty of negligence as matter of law, and for this reason I do not think the negligence of the defendant in furnishing a leaky engine, which I have assumed, becomes a material element in the disposition of the case."

This statement applies with equal force to Mullen's signals if the steam was the cause of Kin-

ney's failure to properly read them. If on the other hand the steam did not interfere with Mullen's signals, then Kinney's error in interpreting them if properly given was the negligence which caused the accident.

Answering this assignment of error in the court below, plaintiff in his brief said:

> "This is another complaint on the subject of contributory negligence, and the respondent wishes to observe at this point that if the appellant is dissatisfied with the finding of the jury on the subject of contributory negligence respondent is willing to have that finding omitted and the judgment corrected accordingly."

We submit that this argument is not only frivolous but silly.

The contention of the defendant, sustained by every eye-witness in the case, except Kinney, was that the dwarf signal not only was against Kinney but that Mullen gave him stop signals down to the very moment of the accident.

If the jury found that Mullen's signals were plain stop signals, given in time for Kinney to stop, but that they were mis-read by Kinney by carelessness, or because of the interference of steam, then the defendant was entitled to a verdict in its favor and not to a mere allowance of $8,000 on a verdict of $40,000.

POINT VIII.

It is respectfully submitted that the subsisting judgment of the State Court should be reversed and the complaint dismissed.

MAURICE C. SPRATT,
Attorney for Petitioner.

HERBERT W. HUNTINGTON,
of Counsel.

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No. 110

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1921.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,

Petitioner,

vs.

JOHN W. KINNEY,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR RESPONDENT.

HAMILTON WARD,
Attorney for Respondent.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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In The

Supreme Court of the United States

OCTOBER TERM, A. D. 1921.

The New York Central & Hudson River Railroad Company,

Petitioner,

v.

John W. Kinney,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of New York.

BRIEF OF RESPONDENT.

Statement of the Case.

The position of the plaintiff in error in this action is that an employee who came into court nine months after an injury which deprived him of one leg and a part of the other, and who has had four verdicts and six trials, is barred by the Statute of Limitations.

The plaintiff in error will hereafter be referred to as the defendant, and the defendant in error as the plaintiff.

The action was originally brought against the New York Central & Hudson River Railroad Company, a domestic corporation, and the Michigan Central Railroad Company, a foreign corporation (Page 2).

The complaint alleged that both defendants were operating in the City of Buffalo, and that the plaintiff was in the employ of the New York Central as an engineer. The court will perhaps take judicial notice that the City of Buffalo is located on the Canadian border, that the Michigan Central runs through Canada, that the New York Central runs through many states, is engaged in interstate commerce and that an engineer employed by it is ordinarily so engaged.

As was established on the last two trials of the case, and found by the jury, the plaintiff in the course of his employment was engaged in moving certain cars which he had taken off of a track close to the International Bridge, over the Niagara River, and upon which track, plaintiff's witnesses, being principally employees of the defendant, swore that nothing but cars from the Canadian side were placed (Pages 26-29, 49, 326-329). For the purpose of moving these cars the plaintiff was attempting to turn his engine on a "Y", at a point governed by interlocking and

manually controlled signals, and the question of the responsibility for the collision involved the examination of almost every question connected with practical railroading.

The original complaint set up the negligence of the defendant and the freedom from negligence of the plaintiff, as now relied on. While pleading all of the facts necessary to recover, no mention was made of the Federal Employers' Liability Act or the fact that the plaintiff and defendant at the time of the accident were engaged in interstate commerce.

Upon the first trial a verdict of no cause of action was rendered as against the Michigan Central, and this defendant has since that time been out of the litigation. One of the trains involved in the collision was a Michigan Central train, but the signals were wholly controlled by the New York Central, who owned the tracks, which were jointly used by the two companies. This is admitted (Pages, 3, 10, 26).

The early history of the litigation is found in 98 Misc. (N. Y. Reports), Page [illegible], in an opinion by Justice Bissell:

> "It also appears that through no fault of the plaintiff the three verdicts rendered in his favor have been set aside, and without a decision anywhere conflicting with the plaintiff's ultimate right to recover; that when the case was tried the first time it was the law

that a head-end brakeman giving signals was a vice-principal; that shortly after the rendition of the first verdict the Court of Appeals reversed the Appellate Division on this subject (in Hallock v. N. Y. O. & W. R. Co., 197 N. Y., 450), and held that a head-end brakeman was not a vice-principal; that this decision required the trial justice to grant a new trial, and thereafter a second verdict rendered, which was appealed from and reversed as against the weight of the evidence, in accordance with the decision in Dunn v. New York Central & H. R. R. R. Co., 149 App. Div., 932, which held that an engineer under similar circumstances was guilty of contributory negligence; that the third trial was then had, and in the meantime the Dunn case was reversed by the Court of Appeals (208 N. Y., 344), and under that decision the third verdict was affirmed in the Appellate Division; and that the last verdict was reversed by the Court of Appeals and a new trial granted in an opinion sustaining the plaintiff's contention as to negligence and freedom from contributory negligence, and basing the reversal solely on an error made by the Trial Court in passing on a request to charge made by the defendant."

Between the date of the third and fourth trial nearly five years elapsed, due to the case going to the Court of Appeals. After the first decision in the Court of Appeals, in which the right of the plaintiff to recover was upheld, although a new trial was granted, the plaintiff moved to amend his complaint to increase the amount of damage asked for, and also alleged:

"And plaintiff further alleges, upon information and belief, that both the plaintiff and defendant, at the times and in the manner above set forth, were then and there engaged in interstate commerce, and were subject to the provisions of an act of Congress known as the Federal Employers' Liability Act, which took effect in April, 1908."

This latter amendment was for the purpose of preventing the defendant from claiming surprise in case interstate commerce appeared upon the trial, as was indicated by the United States Supreme Court, in the case of

Toledo, St. Louis & Western R. Co. v. Slavin, 236 U. S., 454; 35 S. C. R. 306.

Upon an appeal from the order allowing the amendment the Appellate Division, the court of last resort in such matters, affirmed the order (177 A. D., 948).

Upon the fourth trial the jury disagreed. This trial was after the amendment but interstate commerce was not established. Upon the fifth trial the evidence was practically the same as at the present time, it being established that the parties were engaged in interstate commerce by competent proof. Judge Wheeler, however, charged that if the plaintiff was uncertain as to the character of Muller's signal, his failure to stop before passing the dwarf must be considered contributory negligence, which was the *sole* cause of the accident, and which bars a recovery. The case

having been tried on the theory that negligence was comparative, and interstate commerce having been found by the jury, this charge, of course, was error, and resulted in a unanimous reversal in the Appellate Division, reported in (185 A. D., 903).

The case then came on for a sixth trial before Justice Bissell. The jury found negligence. The jury also found contributory negligence. They assessed the total damage and divided it in their verdict. The judgment and order arising therefrom have been unanimously affirmed by the Appellate Division (190 A. D., 967).

Leave to go to the Court of Appeals of the State of New York on questions of law only was granted to the defendant and the Court of Appeals affirmed the judgment in favor of the plaintiff. May 31, 1921. Without opinion.

Reported 231 N. Y., Page 578.

Facts.

The respondent cannot agree with the petitioner's statement of facts. At least, the respondent claims that it merely presents the evidence favorable to the petitioner's contentions, but which has been found to the contrary by the juries which have passed upon the issues.

In order that the court may be in possession of sufficient facts to apprehend the bearing of the

questions of law presented, the following brief summary is made:

The defendant maintains a yard on the bank of the Niagara River near the International Bridge, for the interchange of freight cars between the United States and Canada, and on one track in this yard places cars from Canada (Pages 24-42). Plaintiff, an engineer in the employ of the defendant, operating an engine in yard service, was ordered to take these cars off this track and carry them to East Buffalo (Pages 326, 329, 48, [illegible]). To do this the engine had to be turned around, and as there was no turn table, the plaintiff had to use the "Y" in making the turn. He had permission to do this, and it was in making this movement that the accident occurred.

At the point in question all train movements were controlled by interlocking block signals, and freight and passenger local and through movements were intermingled. A dwarf signal, known as No. 6, controlled the movement of the plaintiff and *authorized his going out on the main track if set in his favor.* As Kinney approached it he was pushing a caboose, and located on the front end of the caboose was a brakeman, charged with the duty of observing signals, under the rules and practice of the company, and transmitting them to the engineer (Pages 134-138, 154, 190, 196). Before coming to this dwarf the engine had to cross Hertel Avenue. This was four hundred and fifty-seven feet from the dwarf, which, in

turn, was eighty-seven feet from the track intersection. The fouling point, however, between the engines on the converging tracks was twenty-seven feet from the track intersection or sixty feet from the dwarf (Page 74). The caboose was forty feet long and the engine projected forty feet ahead of the caboose (Page 75), so that when the head of the caboose reached the fouling point, the cab of the engine was still twenty feet back of the dwarf. When Kinney reached Hertel Avenue he saw the signal in the dwarf and it was green (Page 62). *About this time his fireman looked out of the side of the engine, and also announced the light as green* (Page 61). This was undisputed, although the fireman was in the employ of the defendant at the time of the trial and was in the court room (Pages 62-63).

Green was a safety or proceed signal.

Rule 18 of the defendant provided:

"After a signal has been prepared for an approaching train and it is found necessary to stop them or change the position of the switches or signals, or give another route, the signals must be set at danger, *but no switch changed or signals given to a train on a conflicting route until the train which first had the right of track has come to a full stop.*" (Page 66.)

"Q. So that even if they took the light away from you they couldn't go any further in the movement until you had stopped?

A. Not according to the rule." (Page 66.)

On this subject the defendant's towerman said:

"Q. If Mr. Kinney had been given the green light did you have any business to change the switches and give lights to the other trains on the other track?

A. No, sir.

Q. That would have been contrary to rules, wouldn't it?

A. Yes, sir.

Q. If Mr. Kinney had been given that green light so that he saw it, and his fireman saw it as they approached Hertel Avenue, did you have a business to take it away from him?

A. No, sir.

Q. That is, if he saw that light he had a right to assume that he could proceed out on the main track, didn't he?

A. That was his indication.

Q. That told him just as plainly as words could tell it that the switches were set for him, and they are set against movements on the main track?

A. Yes, sir." (Page 294.)

Thereafter Kinney had the right to proceed without apprehending danger, as both the rule and practice told him that no conflicting movements could be made until he stopped.

It was also his claim that the brakeman on the head-end, charged with the duty of giving him the signal, continued to give him a come-ahead signal until the time of the accident (Page 64). From this point the plaintiff was unable to see the dwarf signal because of leaking steam, coming from defects in the engine, (Page 63) but was able to see

the signals of the brakeman (Page 64). Just before the collision the signals of the brakeman became uncertain, which, under the rule, required Kinney to stop (Page 64). As he did so, a collision occurred with a passenger engine on the converging track, which tipped both engines over and caused the injuries complained of.

The engine which was furnished by the defendant to the plaintiff had been leaking steam for several days and was being operated in violation of the New York State Law governing the use and inspection of engines and boilers. (Pages 162, 163). Temporary repairs had been made in it, but it was not fit for use and had been so reported to the round house superintendent. Nevertheless, the superintendent assured the plaintiff that the engine was in proper condition (Page 202). While some leak of steam had developed, no trouble had occurred until the combination of the change of direction, the darkness, the slight grade, the quartering wind and the low signal occurred (Page 63). That the plaintiff had a right to rely on the signal given by Mullen, the head-end brakeman, and that this signal as described by Kinney, and as given, from the position in which Mullen admitted he stood, was a proceed signal, appears from the testimony of engineers in the employ of the defendant. (See testimony of Dowd, Page 33; Dorgan, Page 196; Kinne, Page 186 and Peck, Page 129).

The defense was that at or about the time of the collision proceed signals were displayed on the main track, and that by reason of the tower being interlocking, it necessarily followed that Kinney could not also have had a proceed signal. It was also testified to by other members of Kinney's crew that *at some point beyond* where Kinney had seen the green light, the light was observed by these brakemen to be purple. The brakeman on the head-end also insisted that before the accident, and in time to stop, he had given Kinney a stop signal. The testimony of these brakemen has never been credited by the courts or juries before whom they appeared for reasons that will appear if the court cares to examine their evidence as set forth in this record.

A complete change in signals could be made in 17 seconds (Page 300), or three times while Kinney was proceeding from Hertel Avenue to the dwarf (Page 302).

The jury have found both the plaintiff and the defendant guilty of negligence as to the movement in question. If Kinney was mistaken about the light or if it in fact was changed the defendant had stationed a man on the end of the leading car in accordance with Rule 102 to tell Kinney about these things (Pages 53 and 54), as the caboose was ahead of Kinney. The jury could find that this brakeman failed in his duty. Of course, if the signals were set for Kinney all

the time then this brakeman was called on to give Kinney nothing more than the signals Kinney says he saw. If on the other hand the signals were set against Kinney and Kinney was negligently running by them into danger, the brakeman on whose signal the movement was necessarily conducted was required to give signals indicating the danger. His conduct on this subject was a proper matter for the jury and the verdict of the jury that he failed to give proper signals has ample evidence to support it.

Plaintiff ventures to make this brief statement of facts in spite of the elaborate statement of facts made by the defendant, as it has always been held from the beginning of this action that a question of fact was presented as to the negligence of the defendant, as alleged in the complaint, and the only claim made here now by the defendant on the facts is that there were no facts to justify a finding of interstate commerce, which will be discussed under the appropriate point.

POINT I.

There is no new cause of action.

Respondent deems these propositions of law established by the following cases:

1st. That if interstate commerce appears upon the trial, the case must be determined by the Federal Law.

2nd. That the plaintiff can sue to recover for the wrong done, and the law to be administered, whether state or federal, is determined by the facts proved.

3rd. That a sufficient allegation to establish a cause of action in tort does not necessarily involve the mention of any statute.

4th. That where an action is duly commenced by the proper party within the time fixed by the Statute of Limitations, amendments which do not set up a new cause of action are within the discretion of the court and are not controlled by the Statute of Limitations.

5th. That a recovery may be had, where the facts proved warrant it, under the Federal Employers' Liability Act without an express allegation in the pleadings that the parties are engaged in interstate commerce, if such proof be made upon the trial and the defendant be not surprised thereby.

6th That an amendment setting up the fact that the parties "at the times and in the manner "above set forth were then and there engaged in "interstate commerce" does not set up a new cause of action.

The amendment to the complaint set up no new facts, except that it increased the damages. The new allegation was as follows:

"And plaintiff further alleges, upon information and belief, that both the plaintiff and the defendant, *at the times and in the manner above set forth*, were then and there engaged in interstate commerce, and were subject to the provisions of an act of Congress known as the Federal Employers' Liability Act, which took effect in April, 1908." (Fol. 49).

As the N. Y. Court of Appeals said in the case of

Payne vs. N. Y. S. & W. R. R. Co., 201 *N. Y.*, 440,

in determining that the facts might be plead in a single count, although liability might be claimed under the common law, the State Employers' Liability Statute and the Federal Statute, through Judge Werner:

"The term 'cause of action' * * * In its simplest analysis * * * is synonymous with 'the right to bring a suit,' and that right is based upon the ground or grounds upon which an action may be maintained. * * * In such cases the different grounds of liability have sometimes been referred to as causes of action, 'when, in fact, there has been but a single cause of action' which could be established by evidence appropriate to each of the grounds upon which the employers' liability is predicated either under the common law or under the statutes. There are other instances in which the statutes have created a new or extended liability not known at common law. In such cases it is quite accurate to say that the statute which establishes a new liability also creates a new 'cause of action,'

for without the statute none would exist. In one case the right, the wrong, and the cause of action may all depend upon the language of the statute, and in another there may be separate and distinct grounds of liability under the common law, and under one or more statutes, which may be so pleaded as to entitle a plaintiff to recover under one or all. Thus, although there may be various grounds of liability, there can be but one cause of action and one recovery. The complaint before us fairly illustrates the difference between a case wholly dependent upon one or more provisions of specified statutes, and one where the defendant's liability may be predicated either upon the common law, the statutes or both. It sets forth facts which render the defendant liable at common law; it contains other allegations which tend to support a claim under the Employers' Liability Act which is pleaded; and it pleads still other averments which bring the case within the rule of the Federal statute. Suppose the plaintiff proves them all. Does that establish three distinct rights in the plaintiff or three independent wrongs against the defendant, or support three separate recoveries? Obviously there is but one primary right, one primary wrong, and one liability. The single wrong has given rise to a single right, which may be established by as many different facts as the nature of the case may justify or demand."

Defendant ignores the Payne case, with the suggestion that since it was decided the main decisions in the Federal Court on this subject have been rendered, but the doctrine of the Payne case

was re-affirmed by the New York State Court of Appeals in the case of

Marion v. Coon Construction Co., 216 N. Y., 180.

The New York State rule on this subject contains a simple test which meets this case exactly.

The Court of Appeals in the case of *Davis v. New York, Lake Erie & Western Railroad Co.*, 110 N. Y., 646, in a tort action where a suit was brought for injuries on account of a defective engine, and where after the trial and after the statute of limitations had run, the complaint was amended to show that the coal used was defective and improper, and an appeal was taken from the order granting the amendment, say:

> "These allegations did not constitute a new cause of action; the plaintiff still based his right to recover upon the same injury caused to him at the same time and place by the wrong of the defendant, and all that was added in the amended complaint were additional specifications of the same wrong. The plaintiff when he framed his original complaint may have been mistaken as to the cause of the effects from which he suffered the injury, but he was not mistaken as to his cause of action.
>
> "It is a fair test, to determine whether a new cause of action is alleged in the amended complaint, that a recovery had upon the original complaint would have been a bar to any recovery under the amended complaint."

The practice of the Courts of the State of New York has been uniform on this subject. The only

test applied to an amendment, even after the statute has run, is its inconsistency.

Gropp v. Great At. & Pac. Tea Co., 161 A. D., 859.

No new liability is created by the Federal Act, which provides:

> "Every common carrier by railroad, while engaging in commerce between any of the several states or territories and any foreign nation shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury * * * resulting in whole or in part from the *negligence* of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its *negligence* in its cars, engines, appliances, etc." (Sec. 8657 U. S. Compiled Statutes).

As the court will see, this was a mere statement of common law liability as it existed in the State of New York from time immemorial. The only change in the law related to the defenses. *Negligence* on the part of the defendant as a proximate cause of the injury is the basis of liability—not a different negligence, but the same negligence. *The act which establishes the liability is the same; no matter under what law the cause of action is enforced.*

The amendment was wise, as some of the Federal courts had held that an affirmative allegation, invoking the Federal Law was necessary to com-

pletely state a cause of action and to prevent any claim of surprise on the part of the defendant when plaintiff undertook to establish interstate commerce.

The negligent act constituting liability was, however, exactly the same, and it is submitted that the Payne case establishes the rule in this state. That the state practice controls in matters of pleading and practice is decided by the United States Supreme Court in the case of

Lee v. Central Georgia Ry. Co., 40 S. C. R., 254 (252 U. S. 109), where Judge Brandeis, writing for the court says:

"Whether two causes of action may be joined in a single count, or whether two persons may be sued in a single count are matters of pleading and practice relating solely to the form of the remedy. When they arise in state courts the final determination of such matters ordinarily rests with the state tribunals even if the rights therein being enforced are created by Federal law. (Citing cases) This has been specifically held in cases arising under the Federal Employers' Liability Act. (Citing cases) It is only when matters nominally of procedure are actually matters of substance which affect a federal right, that the decision of the state court therein becomes subject to review by this court. (Citing cases)."

Thornton on Employers' Liability Acts, Sec. 199, says:

"The rule regarding amendments is also controlled by the local practice, and if a general allegation of negligence is sufficient in

the State courts in actions for negligence generally, then it is sufficient in an action on the Federal Act."

This statement is on the authority of *Brinkmeier v. The Missouri P. R. Co.*, 32 S. C. R., 412 (224 U. S., 268) where the Supreme Court of the State of Kansas had held that in the absence of an allegation that cars were moving in interstate traffic, the petition did not state a cause of action under the original Safety Appliance Act. The Supreme Court (Judge Van Deventer) says:

> "We think the ruling was right. * * * It (the Act) did not embrace all cars used on the line of such a carrier, but only such as were used in interstate commerce. * * * In 1908, after the case had been twice tried without any decisive result, the plaintiff sought to amend his petition by charging that the cars were used in moving interstate traffic, but the application was denied, the period of limitation having expired in the meantime. Error is assigned upon this ruling, but as it involved only a question of pleading and practice under the Laws of the State, it is not subject to review by us". (Citing Texas & New Orleans Railroad Company v. Miller, 221 U. S., 408-31 S. C. R. 534.)

and also

Central Vermont R. R. Co. v. White, 238 U. S., 507 (35 S. C. R. 865) where the Court said, Justice Lamar rendering the opinion:

> "There are, however, a series of assignments in this record which must be disposed of in conformity with the general principle that matters affecting the remedy are to be governed by the law of the forum. They are

all based on the fact that, while the railway company had lines running through Massachusetts and Vermont into Canada, the declaration contained no allegation that White was engaged in interstate commerce at the time of the collision. The company made this the ground of a plea in bar. The administratrix thereupon filed a replication admitting that the deceased was engaged in such commerce at the time of his death. The company demurred to the replication on the ground that it was a departure from the cause of action under the state law, and the assertion a new cause of action under the Federal Employers' liability law. This demurrer was overruled and after verdict the defendant made the same facts the basis of a motion in arrest of judgment.

The evidence showed a liability under the employers' liability act, and without stopping to discuss whether, on general principles, the motion should not have been overruled because the declaration was amendable to conform to the proof (Grand Trunk Western R. Co. v. Lindsay, 233 U. S., 48, 58 L. ed. 842, 34 Sup. Ct. Rep. 581, Ann. Cas. 1914C, 168; Toledo, St. L. & W. R. Co. v. Slavin, 236 U. S. 454, 59 L. ed. 35 Sup. Ct. Rep. 306), it is sufficient to say that the supreme court of the state held that the defect in the original declaration had been cured by the charge in the plea and the admission in the replication that White was employed in interstate commerce. That decision on a matter of state pleading and practice is binding on this court."

Re Kinear vs. Stilus, 246 U. S. 631, 38 S. C. R., 415;

Louisville & U. R. Co. vs. Holloway, 246 U. S. 525, 38 S. C. R. 379.

It is true that both the original and the amended complaint referred to a notice which was a pre-requisite to an action brought under the State Employers' Liability Act, but it must be remembered that if the proof showed that the parties were not engaged in interstate commerce, the State Act applied. The Court so charged the jury in the trial under review. The Federal Act only applied if the proof showed interstate commerce, and the jury so found, in which case the allegations relating to the State Act must be treated as surplusage. There has never been any abandonment of the plaintiff's cause of action under the State statute. If the defendant now prevails in its contention under its Point II, that the plaintiff failed to establish his engagement in interstate commerce, his cause of action under the State Act is still alive.

In writing in the

Wolff case, 226 U. S., 570 (33 S. C. R. 135),

Judge Pitney said:

> "It is true the original petition asserted a right of action under the laws of Kansas, without making reference to the act of Congress. But the court was presumed to be cognizant of the enactment of the employers' liability act, and to know that, with respect to the responsibility of interstate carriers by railroad to their employees injured in such commerce after its enactment, it had the effect of superseding state laws upon the subject. Second Employers' Liability Cases

(Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 53, 56 L. ed. 327, 347, 38 L. R. A. (N. S.) 44, 32 Sup. Ct. Rep. 169. Therefore the pleader was not required to refer to the Federal act, and the reference actually made to the Kansas statute no more vitiated the pleading than a reference to any other repealed statute would have done."

If no amendment had been made, and if it had appeared on any of the trials that at the time of the accident the parties were engaged in interstate commerce, then as the plaintiff urges, the court would have been obliged to have submitted the case under that statute. Even so, without any reference to it in the pleadings, as this court said in the

Slavin case, (236 U. S., 454),

"Neither the plaintiff's complaint nor the defendant's answer contained any reference to the Employers' Liability Act, but, over the plaintiff's objection, evidence was admitted which showed the train on which the plaintiff was riding at the time of the injury was engaged in interstate commerce. Thereupon the railroad company insisted that the case was governed by the provisions of the Employers' Liability Act, and moved the court to direct a verdict in its favor. That motion having been overruled, the defendant asked the court to give in charge to the jury several applicable extracts from that Federal statute."

A verdict having been rendered in favor of the plaintiff, the case came to this court by writ of error. This court said:

"But a controlling Federal question was necessarily involved. For, when the plaintiff brought suit on the state statute, the defendant was entitled to disprove liability under the Ohio act, by showing that the injury had been inflicted while Slavin was employed in interstate business. And, if without amendment, the case proceeded with the proof showing that the right of the plaintiff and the liability of the defendant had to be measured by the Federal statute, it was error not to apply and enforce the provisions of that law."

That is what would have been done here had there been no amendment. The amendment merely deprived the defendant of any right to claim surprise.

In the case of

Seaboard Air Line Co. v. Koennecke, 239 U. S., 352 (36 S. C. T. 126),

in error from the Supreme Court of South Carolina to review a judgment which affirmed a judgment of the State Court in favor of the plaintiff, in an action for death, Judge Holmes, after pointing out that the declaration set forth negligence and dependency, and that the *testimony* brought out the fact that there was interstate commerce, and that the plaintiff asked leave to amend, said:

"The declaration as it stood not disclosing in terms under which statute the action was brought * * * The amendment was allowed over a denial of the power of the court to allow it, which, however, is not argued here. (Citing cases) The defendant then objected

to the trial going on. The court left it to the counsel to say whether he was taken by surprise, and, the counsel not being willing to say so, although saying that he was not prepared on the question of dependency, ordered the trial to proceed. * * * There is nothing to show that the trial court exceeded its discretionary power in allowing the trial to go on * * * The court well may have considered that the defendant was endeavoring to get a technical advantage, as it had a right to, but that it would suffer no wrong. The cause of action arose under a different law by the amendment, but *the facts constituting the tort were the same, whichever law gave them that effect.*"

If, therefore, the Federal law would have been applied without the amendment, upon proof of interstate commerce, it would seem idle to ask this court to say that the allowance of such an amendment, which was justified by the proof, and which was merely in support of the cause of action originally alleged, justifies this court in setting aside the verdict and granting a new trial.

As this court pointed out in the Lee case, these questions of pleading are matters of state practice. Nevertheless, under the liberal rules of the Federal practice, as found in Section 1591 of the United States Compiled Statutes, being Section 954 of the Revised Statutes,

"No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the Unted States,

shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules prescribe."

That the exercise of this discretion is not reviewable has been held so many times that I will not burden this brief with citations, and that such amendment may be exercised at any stage of the case, even after trial and judgment, is well settled. The precise question here presented came up squarely in the Federal Courts for the first time, so far as I know, in the case of

Smith v. Atlantic Coastline R. Co., 210 Fed., 761 (Circuit Court of Appeals, Fourth Circuit.)

The injury occurred on December 4th, 1908. The action was commenced March 8th, 1910, and the original complaint did not refer to interstate commerce. In the amended complaint, filed June 15th, 1912, plaintiff added an allegation of interstate commerce. The defendant, by amended an-

swer, pleaded the Statute of Limitations, and assigned the court's refusal to sustain this plea as error when the case reached the Circuit Court of Appeals, Judge Connor saying:

> "It will be convenient to dispose of the defendant's assignment of error first, as it is based upon a plea in bar and, if sustained, renders it unnecessary to consider plaintiff's writ of error. The learned judge, after taking into consideration defendant's motion, announced his conclusion, with his reasons therefor set out in the transcript. He was of the opinion that the amendment did not introduce a new cause of action; that the facts upon which plaintiff's cause of action were based were set out in the original complaint, the amendment simply alleging the interstate character of defendant's business and of the train upon which he was employed when he sustained the injury. We do not deem it necessary to say more than that we concur in the reasoning and conclusion reached by the learned judge below. The original complaint stated a cause of action. The District Court had jurisdiction by reason of the diversity of citizenship. To this cause of action, as stated in the complaint defendant was entitled to interpose certain affirmative defenses. When, by the amendment, the fact was developed that defendant was engaged in interstate commerce, and that the injury was sustained by plaintiff while employed on an interstate train of cars, defendant, by virtue of the federal statute, was deprived of these defenses. As said by Judge Smith: 'The statute does not deal with the cause of action, so far as negligence is concerned, at all, but with the defenses that may be allowed and the measure of the recovery.'

The exception to the refusal to grant defendant's motion for an instruction that plaintiff's cause of action was barred by the statute of limitation cannot be sustained."

This case has been followed in the First Circuit in the case of

Boston & Maine Railroad Co. v. Sullivan, 275 Fed., 890 (Writ of Certiorari denied, 42 S. C. R., 461)

and in the Fifth Circuit, in the case of

Newberry v. Central of Georgia Ry. Co., 276 Fed., 337 (Writ denied, 42 S. C. R., 270.)

Defendant dismissed the Smith case, at Page 67 of his brief, with the statement that it is the only case cited by the plaintiff which seems to sustain his contention and that it is in conflict with many authorities, and is clearly overruled by the Renn case.

With all deference to the learned counsel, both the First Circuit and the Fifth Circuit cite the Renn case *in support* of the Smith case, and the Court points out in the Newberry case:

"It was held that the amendment did not allege a new cause of action, but merely expanded or amplified the original complaint. It was also pointed out in the cited case that the action was not based upon the laws of North Carolina, because the injury occurred in Virginia, and that the action was not based upon the laws of Virginia because they were

not pleaded; that the fact that it was alleged that the defendant operated its railroad in states other than Virginia was material only if the cause of action arose in interstate commerce and therefore under the federal employers' liability act. But these comments by the Supreme Court only go to show that it might be concluded that the railroad company was engaged in interstate commerce. However, under the terms of the Act it is inapplicable unless the *employee* is also 'employed by such carrier in such commerce'. The allegation of the complaint in the Renn case was thus construed as stating that the Railroad Company was an interstate carrier, but there was no allegation that it was engaged in interstate commerce at the time of the injury. By a similar expansion or amplification of the original complaint in the instant case there is as much basis for holding that plaintiff in error, at the time of his injury, was engaged in interstate commerce, in view of the allegation that he was a telegraph operator. The testimony of the train despatcher that plaintiff in error was engaged in assisting in directing the movement of the interstate trains, was to be expected. It is doubtful if the train despatcher of any railroad company and the operators under him are not constantly engaged in directing the movement of passengers or freight in interstate commerce. In one case at least it has been held that courts will take judicial notice that a particular railroad company is engaged in interstate commerce. Dingman v. Railroad Co., 164 Mich. 328, 130 N. W. 24, 32 L. R. A. (N. S.) 1181. It is also stated in 15 R. C. L. 1119:

'As courts take judicial notice of the leading geographical features of the country, and

as the locality of important lines of railroad, once established, become as fixed and permanent and as well known as any other geographical feature, the courts will have cognizance of the directions, runs and locations of the important railroads within their jurisdictions,' etc."

And the Court further states:

"Of course, a remedy provided by the Federal Employers' Liability Act is exclusive, and it is clear that the act must be given effect wherever it comes into conflict with a right of action which would otherwise exist. But in this case plaintiff in error alleged a cause of action which exists under the common law, and in the absence of any statute, state or federal. If the State of Alabama had never enacted its Employers' Liability Act, and if Congress had never enacted the Federal Employers' Liability Act, plaintiff in error would nevertheless, have been entitled to recover. If the facts pleaded did not fall within the purview of either statute, it was a matter of no concern to him. Cases are constantly arising out of the relation between railroad employees and the railroad company which employ them, which are not remediable under either the express statutory provisions of a state or under the act of congress, but only at common law or under the general principles of law universally recognized and enforced. Indeed, it was suggested in the argument of this case that the box car in which plaintiff in error was at work at the time he claims to have suffered injury did not fall within Section 1 of the Federal Employers' Liability Act, which creates liability for any defect or insufficiency in the 'cars, engines, appliances, machinery, track, road-bed, works, boats, wharves or

other equipment'. If that be true, it follows that it was error to hold the Act of Congress applicable. We are of the opinion, however, that the box car was a part of the 'equipment', but that the amendment does not constitute a departure as defined in Railway Co. v. Wyler, supra, and as applied in the later cases in the Supreme Court above cited.

A plaintiff is not required to state under what law he brings his action, but is only required to plead facts which are under the law —that is, any law applicable to the case— entitle him to recover. It so happens that in the case at bar the facts pleaded entitle plaintiff to recover at common law if they fail to come within the provisions of either the Alabama Statute or the Act of Congress. If in proof of such a case it develops that a statute authorizes a recovery upon the facts pleaded, in reason and in justice the utmost the wrongdoer is entitled to is to have the law made applicable by the statute given in the charge to the jury. It would be manifestly absurd, and in contradiction in terms, to hold that a plaintiff cannot recover, because, forsooth, he has pleaded and proved a case for which the law provides he shall recover.

It is contended that it was within the discretion of the trial court either to permit or refuse the filing of an amendment to the complaint, which discretion is not reviewable unless abused. But the District Court, as shown by the judgment roll, refused to allow the amendment because in its opinion it was without jurisdiction or authority to do so. It is apparent that the Court would not have disallowed the amendment if it had been of opinion that its discretion could be exercised." (Italics ours.)

It, therefore, appears that it is the law of three of the Federal circuits that the amendment here sets up no new cause of action.

As is pointed out in the three cases just cited, the Supreme Court itself has time after time passed upon this question, and it has never construed the Renn case and the Wyler case as the defendant construes them.

Supreme Court Decisions on the Subject.

In denying various applications for writs of certiorari in which the question presented by the petitioner here has been formerly presented to this court, to which reference will be hereafter made, denials have always been based upon the *Wulf case*, 226 U. S. 570; 33 S. C. R., 135, and it is respectfully submitted that this case is still the law and is decisive of the claim of the petitioner.

In this case, as in the case at bar, there was no reference to interstate commerce. It is true that the petition alleged that the train upon which the deceased met his death was going from one state to another, but the action was brought, as was specifically alleged, under the State statute. The death occurred on November 27th, 1908. The action was brought by the widow in her individual capacity, which was proper under the State statute but not proper under the Federal statute.

In 1909 the defendant answered, without setting up interstate commerce, but in 1911—three years after the date of the death—the defendant amended its answer alleging interstate commerce. Thereupon the plaintiff amended the petition alleging that on January 4th, 1911 (more than two years after the date of the death), she had been duly appointed Administratrix of the Estate of the deceased, and for the first time set up interstate commerce. The acts of negligence relied upon were the same. Plaintiff got a verdict, which was affirmed by the Circuit Court of Appeals (192 Fed., 919). The case came to the United States Supreme Court on a writ of error. It was urged, as Judge Pitney pointed out in his opinion, that the argument for reversal rested wholly upon the fact that the first mention of the Federal Act, or the appearance in the action of the personal representative of the deceased was more than two years after the death, and that, therefore the two years statute had run. In discussing this claim, Judge Pitney said:

> "It seems to us, however, that aside from the capacity in which the plaintiff assumed to bring her action, there is no substantial difference between the original and amended petitions. In the former, as in the latter, it was sufficiently averred that the deceased came to his death through injuries suffered while he was employed by the defendant railroad company in interstate commerce; that his death resulted from the negligence of the company and by reason of defects in one of its locomotive engines, due to its negligence; and that since the deceased died unmarried

and childless, the plaintiff, as his sole surviving parent, was the sole beneficiary of the action. It is true the original petition asserted a right of action under the laws of Kansas, without making reference to the act of Congress. But the court was presumed to be cognizant of the enactment of the employers' liability act, and to know that, with respect to the responsibility of interstate carriers by railroad to their employees injured in such commerce after its enactment, it had the effect of superseding state laws upon the subject. Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 53, 56 L. ed. 327, 347, 38 L. R. A. (N. S.) 44, 32 Sup. Ct. Rep. 169. Therefore the pleader was not required to refer to the Federal act, and the reference actually made to the Kansas statute no more vitiated the pleading than a reference to any other repealed statute would have done.

It is true that under the Federal statute the plaintiff could not, although sole beneficiary, maintain the action except as personal representative. So it was held in American R. Co. v. Birch, 224 U. S. 547, 56 L. ed. 879, 32 Sup. Ct. Rep. 603. But in that case there was no offer to amend by joining or substituting the personal representative, and this court, while reversing the judgment, did so without prejudice to such rights as the personal representatives might have. The decision left untouched the question of the propriety of such an amendment as was applied for and allowed in the case before us—an amendment that, without in any way modifying or enlarging the facts upon which the action was based, in effect merely indicated the capacity in which the plaintiff was to prosecute the action. The amendment was

clearly within Sec. 954 Rev. Stat. U. S. Comp. State., 1901, p. 696.

Nor do we think it was equivalent to the commencement of a new action, so as to render it subject to the two years' limitation prescribed by Sec. 6 of the employers' liability act. The change was in form rather than in substance. (Stewart v. Baltimore & O. R. Co., 168 U. S., 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105). It introduced no new or different cause of action, nor did it set up any different state of facts as the ground of action, and therefore it related back to the beginning of the suit." (Citing many cases).

The Court then discusses the distinction between the Wulf case and the Weiler case (158 U. S., 285), which is the authority relied upon by the petitioner here, and points out that in the Weiler case not only a different state of facts was set up by the petition, but a different rule of law invoked as the ground of the action.

The only distinction between the case at bar and the Wulf case is the fact that in the Wulf case the petition, while being expressly under the State statute, also contained an allegation that the train upon which the deceased was working went from one state to another. It would seem, from the reasoning of Judge Pitney, that this casual allegation was not the turning point in the case, but that the question that determined whether or not a new cause of action was set up was whether the plaintiff still relied upon the same acts of negli-

gence. This view is supported by the fact that in many subsequent cases where the question has been presented to this Court, and where writs of error and writs of certiorari have been denied, the element in the Wulf case which distinguishes it from the case at bar, viz, the casual allegation that the train was proceeding from one state to another, is lacking, and that, nevertheless, this court has applied the reasoning of the Wulf case, as will be later seen. In fact, in the Wulf case, the petitioner specifically and particularly relied upon the State statute, and by bringing the action in her personal capacity expressly elected to rely upon that statute to the exclusion of the Federal act, while in the case at bar, although the plaintiff served a notice authorizing him to rely upon the State statute, nevertheless, in his capacity to sue, and in the facts alleged he was in a position to recover under the Federal Act if it appeared upon the trial that the parties were engaged in interstate commerce; and unless it is the law that the plaintiff was obliged to mention the statute by name, or at his peril to plead every fact necessary to invoke that statute, then, as was pointed out in the Slavin case, *supra*, he could have recovered under the Federal act upon due proof of the facts requiring its application without any amendment. If that is the law, his position is certainly not weakened by the fact that an amendment was had. Under the practice of the State Court, he had a right to plead his facts in one count. He had a

right to recover under whatever law the facts proved applied to. The question as to whether or not the plaintiff was engaged in interstate commerce was a question of fact. The decision of that question was necessarily preliminary to the determination of the question of liability. Under the law and practice of his State, all he had to plead were the acts constituting the negligence of the defendant. Freedom from contributory negligence and assumption of risk were matters of defense, no matter under which law he recovered.

Much is made by the petitioner of the fact that interstate commerce was not proved until the fourth trial of the action. This is not a sound legal objection, as the petitioner and this court know that the trial under review is the *last* trial, and if the plaintiff in the early stages of the litigation had not learned of the origin of the cars that he was moving, or properly apprehended the legal effect of that knowledge, it would indeed seem strange to ask the Supreme Court of the United States to penalize him on that account, if he was otherwise entitled to recover. Our position is that the amendment was unnecessary, but that it was properly granted, was within the sound discretion of the court, and set up no new cause of action. That this can be done after two years this court has repeatedly held.

A test of the correctness of our position, we respectfully submit, is the following: With the

original pleading, as approved by our State practice, authorizing us to recover under any law applicable to the facts plead, supposing in the fourth, or fifth, or sixth trial, and after two years, the defendant had proved that the parties were engaged in interstate commerce, and sought on this ground to bar the plaintiff from any recovery? No court has ever permitted such an act of injustice under legal forms, and in its final analysis, if the contention of the defendant prevails, the same result would be accomplished now.

In the case of *St. Louis, San Francisco & Texas R. R. Co., Plaintiff in error v. Maud Smith, as Admx. of the Estate of M. T. Seal, dec'd*, 37 S. C. R., 477; 243 U. S. 630, the judgment of the Court of Civil Appeals, for the Fifth Supreme Judicial District of Texas, was affirmed. The Court saying:

> "Per Curiam, judgment affirmed, with costs upon the authority of Mo. K. & T. R. Co. v. Wulf, 226 U. S., 570; 33 S. C. R., 135; Seaboard Airline R. Co. v. Koennecke, 239 U. S., 354; 36 S. C. R., 126; Seaboard Airline Co. v. Renn, 241 U. S. 290; 36 S. C. R, 567; see St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156; 33 S. C. R., 651."

The facts are found in

171 *So. Western Rep.*, 512 and
160 *So. Western Rep.*, 317.

It was a death case. The original action was started in 1909 in the name of the next of kin, to

whom the Texas statutes give the cause of action. So far as appears from the reports, the complaint did not charge any violation of the Federal Act or mention the subject of interstate commerce. The defendant asked the plaintiff to elect whether she was proceeding under the Federal Act or the State Act. The court did not require the plaintiff to do this. The plaintiff went to trial and got a judgment under the State Act. This was affirmed by the highest court in Texas and the question was taken to the United States Supreme Court, reported in (229 U. S., 156), where the verdict in favor of the plaintiff was reversed on the ground that the facts showed the parties were engaged in interstate commerce. Then the defendant made a motion in the Texas courts to have the complaint dismissed. This motion went to the highest court in Texas, where an opinion was written, found in (160 Western Rep., 317). The court refused to dismiss and said the plaintiff ought to have a chance to amend. Plaintiff then amended by substituting the personal representatives in the place of the next of kin and recovered under the Federal Act. This recovery went up to the highest State Court in Texas, reported in (171 South Western Rep., 512) where the specific point was presented that the Federal Act had not been pleaded, and that more than two years had elapsed, and it was this decision in favor of the plaintiff which was affirmed in the United States Supreme Court, *supra*.

It would seem that if the plaintiff can amend after two years by putting in a personal representative, and pleading the Federal Act, that he certainly can amend where all he has to do is to plead the Federal Act.

In discussing this case the petitioner does not meet the question. The amended petition he refers to within the two years did not set up interstate commerce, as we read the reports, *and this court set aside the verdict rendered under the State Law because interstate commerce actually appeared upon the trial and no recovery was sought under the Federal Act*, and no representative appointed and no interstate act plead until two years had elapsed, and it is to be noted that the right of the plaintiff to recover was placed by this court upon the Wulf case, thus demonstrating that the casual allegation that the plaintiff was proceeding from one state to another contained in the petition in the Wulf case was not the ground upon which the ruling was made.

The same question again came before the court in the case of

Illinois Central R. R. Co. v. Lannis, 38 S. C. R., 334 (246 U. S., 652),

where a writ of error had been granted upon the application of the defendant, bringing up for review a decision of the Supreme Court of the State of Louisiana, reported in (140 Louisiana, Page 1;

72 Southern, Page 78), where the facts were as follows:

The deceased was employed by the Railroad Company in pumping oil into the tender of a locomotive. He was injured through an explosion brought about by the negligence of a fellow servant. An action was commenced in the name of the widow under the law of the state. It was subsequently determined in another action for the death of another employee that the work was interstate. The widow was allowed to qualify as Administratrix and amend her complaint *more than two years after the event*. Defendant plead the Statute of Limitations. The Administratrix secured a verdict. Both parties admitted that the cause was controlled by the Federal Act, the Supreme Court of Louisiana holding that if the original action were brought in time, the amendment was proper. In dismissing the writ of error the United States Supreme Court said:

> "Per Curiam. Judgment affirmed with costs upon the authority of Missouri, Kansas & Texas Ry. Co. v. Wulf, 226 U. S., 570, 576; 33 Sup. Ct. 135; 57 L. Ed. 355; Ann. Cas. 1914 B. 134; Illinois Surety Co. v. United States, 240 U. S., 214, 221; 36 Sup. Ct. 321; 60 L. Ed. 609; Seaboard Air Line Ry. v. Renn, 241 U. S. 290, 293-294; 36 Sup. Ct. 567; 60 L. Ed. 1006."

There is nothing in the petitioner's argument which distinguishes this case from the case at bar.

Again the question came before the United States Supreme Court in the case of

Baltimore & Ohio R. Co. v. Smith, (reported in 28 S. C. R., 335; 246 U. S., 653).

This was another writ of error to the Court of Appeals of the State of Kentucky, reported in (169 Kentucky, 593; 184 So. Western Reporter, 1108).

In this case the accident complained of occurred in 1909. Within two years an action was brought, which did not set up interstate commerce or mention the Federal Act. After the two years had expired the plaintiff filed an amended complaint, asking for increased damages, and to this the defendant answered, pleading the Federal Act and that the cause of action was barred by the Statute of Limitations. Nevertheless, the court held that the action would lie and that a recovery could be sustained under the Federal Act.

The court relies on the Wulf case (226 U. S., 570) and the Seal case (229 U. S., 156) and says:

"On the authority of these cases we think it is clear that when a cause of action arises under the Federal Statute, but suit is brought under the State Law, or by some person not authorized to maintain an action under the Federal Statute, defects in the original petition may be cured by an amendment that does not set up a new and distinct cause of action filed after the expiration of two years from the accrual of the cause of action, as the amendment will relate back to the filing of the original petition."

This position the United States Supreme Court sustained, saying:

> "Per Curiam. Judgment affirmed with costs upon the authority of: 1. Missouri, Kansas & Texas Ry. Co. v. Wulf, 226 U. S., 570, 576, 33 Sup. Ct. 135, 57 L. Ed. 355; Ann. Cas. 1914 B, 134; Illinois Surety Co. v. United States, 240 U. S., 214, 221; 36 Sup. Ct. 321, 60; L. Ed. 609; Seaboard Air Line Ry. v. Renn, 241 U. S. 290, 293-294, 36 Sup. Ct. 567; 60 L. Ed. 1006. 2. Chicago Junction Ry. Co. v. King, 222 U. S. 222, 32 Sup. Ct. 79, 56 L. Ed. 173; Seaboard Air Line Ry. Co. v. Padgett, 236 U. S., 668, 673, 35 Sup. Ct. 481, 59 L. Ed. 777; Seaboard Air Line Ry. v. Koennecke, 239 U. S. 352, 355, 36 Sup. Ct. 126, 60 L. Ed. 324; Great Northern Ry. Co. v. Knapp, 240 U. S., 464, 466, 36 Sup. Ct. 399, 60 L. Ed. 745; B. & O. R. R. Co. v. Whiteacre, 242 U. S, 169, 37 Sup. Ct. 33, 61 L. Ed. 228."

In this case as in the Wulf case, the original petition, filed within two years, contained the casual allegation that the train which the plaintiff was operating ran through different states, but the action was brought under the State Act and by the person there authorized to bring it, and the writ of certiorari is denied in the United States Supreme Court on the authority of the Koennecke case, where there was no such casual allegation.

Again the question came up in the case of *Curtice v. Chicago & No. Western Ry. Co.* in the Supreme Court of Wisconsin, reported in

(156 North Western Reporter, at page 484, 162 Wisconsin, 421).

An action was brought against a railroad under the state law. More than two years after the injury to the plaintiff he was permitted to amend his complaint to allege facts showing that the plaintiff and defendant were engaged in interstate commerce.

From opinion by Kirwin, J.:

"The point involved upon this appeal, under the assignments of error, is whether the amended complaint set up a different cause of action than that stated in the original complaint. The contention of the appellant is that there is but one cause of action, and that under the federal act, while on the part of the respondent it is insisted that the original complaint set up a cause of action under the state law, and that the amendment changed it from a cause of action under the state law to one under the federal act.

(1) It is obvious that but one cause of action existed upon all the facts stated in the amended complaint. It is equally obvious that the original complaint was defective in failing to state certain facts going to show that at the time the injury was sustained the parties were engaged in interstate commerce. Nothing stated in the amended complaint was in conflict or inconsistent with the allegations of the original complaint. The cause of action upon which the plaintiff sought to recover damages was defectively stated in the original complaint, and the defects were cured

by the amendment. But one cause of action was stated. The amendment related back to the original complaint and became a part of it; hence the statute of limitations was no defense." (Citing the cases heretofore cited).

An application for a re-hearing was made in this case on the strength of the Renn case (241 U. S., 290), and again the Supreme Court of Wisconsin considered the question (reported in 166 Wisconsin, 594; 166 North Western Reporter, 444).

The court reiterated this view that the amendment allowed did not set up a new cause of action, but merely perfected a statement of the only right of action the plaintiff had under the facts originally pleaded. It added, however, this observation:

> "The case of Seaboard Air Line Ry. v. Renn, 241, U. S., 290 (the case annotated), seems by implication, though not by express decision, to hold a different doctrine from this, and were the question presented to us as an original question on this appeal, there would be a strong argument in favor of the proposition that we ought now to follow the intimation of the Federal Supreme Court. For myself I very much doubt whether that court will itself follow the intimation when the question is squarely presented for decision."

It will thus be seen that the exact question presented here was presented there. Application for a writ of certiorari was made to the United States

Supreme Court *and denied*, reported in (38 S. C. R., 578, 247 U. S., 510).

The defendant urges that this case can be distinguished from the case at bar by the fact that the North Western Railway Company plead interstate commerce as an answer to the original complaint. This has no force, because the plaintiff did not elect to proceed upon these pleadings, but as is specifically shown in the opinion (162 Wisconsin, 421), the plaintiff thereafter amended and proceeded to trial upon his amended petition and not upon the original petition and answer, and it was the question of his right to so amend after the two years statute had expired that was before the Supreme Court of Wisconsin and this court. It would seem that where the plaintiff got the information about interstate commerce cannot be a determining factor in the settlement of this question, whether he got it from the defendant's answer, or the proof upon the trial, or subsequently acquired information, as in the case at bar. *The point is that a recovery can be had under the Federal statute without an allegation of interstate commerce in the complaint within two years, where the action has been duly commenced and interstate commerce appears upon the trial, and no different elements of negligence are sought to be established by the plaintiff.*

In support of this contention we also cite Texas & Pacific Railway Company vs. Cox, 145 U. S. 593, 12 S. C. R., 905-908.

Many of these cases were before Justice Bissell, who wrote the opinion that permitted the amendment, which is reported in

98 *Misc. Reports Page 11* (affd. 177 A. D. 948)

and the learned Court in the Fifth Circuit Newberry case bases its decision on the Smith case and the Konnecke case, drawing from them an entirely different conclusion than that sought to be drawn by the defendant.

THE RULE IN THE STATE COURTS THAT HAVE PASSED UPON THE QUESTION AGREES WITH THAT OF THE THREE CIRCUIT COURTS PREVIOUSLY CITED.

The rule in New York State is stated in this case variously reported in

98 Misc., 11
177 A. D., 948
231 N. Y., 578,

and also in a recent case

Kent v. Erie Railroad Co., 201 A. D., 293.

Alabama:

L. & N. R. R. Co. v. Echols, 84 So. Rep. 827, (decided December 19, 1921).

From headnote:

"A complaint for injuries to a railroad employee which was silent as to whether his employment was interstate or intrastate may be amended after expiration of the two years

within which to bring an action under the Federal Employers' Liability Act to allege that the employment was interstate."

Connecticut:

Vickery v. New London R. Co., 87 Conn. 634; 89 Atlantic, 277.

"The worst that can be said of the complaint from the defendant's standpoint is that it contains no allegations showing that it was brought under the Federal Statute; that subject. * * * A plaintiff may not, of course, avail himself of the allegations of an answer to introduce or prosecute a new cause of action against which a statutory limitation has run, but he may do so to help out a defective statement of his cause of action. That is the situation in this case. The defendant's allegations accomplished the same curative result that was attempted to be accomplished by the proposed amendment. It matters not that these allegations came into the pleadings more than two years after the plaintiff's injuries were sustained. The effect of them was not to give to the plaintiff a new cause of action, but to help out the original cause of action upon which action had been brought within the statutory period."

Defendant's criticism of this authority is that the Trial Court refused to allow the plaintiff an amendment. In view of the fact that the highest court of the State allowed the plaintiff to recover without an amendment, the case would seem to be an authority for our contention.

Georgia:

In *Gainsville Midland Ry. v. Van Dever*, 141 Georgia, 350 (80 So. Eastern 997), the Supreme Court of Georgia allowed an amendment in an action by an individual, alleging the Federal Act, more than two years after the injury.

Of this case the defendant says that there was a stipulation of fact. As this stipulation merely supplied the facts, and as the defendant still opposed the amendment on the ground that the statute had run, the case remains an authority for the plaintiff.

Michigan:

The Supreme Court of Michigan, in

Fernette v. Pere Marquette R. R., 175 Mich., 653,

held that in an action originally brought under the State Employers' Liability Act, where interstate commerce appeared on the trial, more than two years after the accident, an amendment was proper setting up the engagement of the parties in interstate commerce.

This was again approved by the Supreme Court in the case of

Jorksen v. Grand Rapids & I. R. Co., 189 Mich. 537 (155 North Western, 535).

Texas:

The Court of Civil Appeals of Texas in

Bird v. Fort Worth & R. G. Ry. Co. 207 South Western, 518,

also reported in (196 South Western, 597), held that there was no such departure between the allegations of the original petition and the amended petition with respect to the negligence relied on for recovery as would prevent the amendment from relating back to the filing of the original petition.

The Texas rule is also stated in the case of

Smith, as Admx. of Seale, supra,

which went to the United States Supreme Court and which has been heretofore discussed.

Tennessee:

The same conclusion was reached by the Supreme Court of Tennessee in

Nashville C. & S. T. L. Ry. v. Anderson, 134 Tenn., 666 (185 S. W., 677),

Nebraska:

and by the Supreme Court of Nebraska in

Ziknik v. Union Pacific R. Co., 95 Nebraska, 152 (145 North Western, 344).

In this case a writ of error was sued out by the defendant to the United States Supreme Court, which was subsequently dismissed on the defendant's motion (239 U. S., 650; 36 S. C. R., 159).

Mississippi:

In the case of

Broom v. Southern Ry. in Mississippi, 76 So. Rep., 725,

the Supreme Court of the State of Mississippi has passed upon our question.

On June 19th, 1915, the plaintiff brought an action against the defendant for the death of her intestate. The petition alleged that the defendant was an *intrastate* railroad and asked for damages under the State Law. The death occurred in June, 1913. In September, 1915, the Railway Company gave notice that the deceased was engaged in interstate commerce. Following this, and in September, 1915, the declaration was amended to set up interstate commerce. Both the notice and the amendment were after the two years had elapsed. The defendant urged that the statute had run, and this question came before the Supreme Court, which said:

> "It will be observed here that the only amendment made to the original declaration was the allegation that the injury occurred while the parties were engaged in interstate commerce, instead of intrastate commerce. This amendment did not present a new or different statement of facts upon which the action was based, but merely amended the declaration, so as to come within the operation of the Federal Employers' Liability Act, instead of the state law. The allegations contained in the original declaration did not support a cause for action under the federal law, but the amendment is not inconsistent with

the purpose and relief originally sought by the declaration. It appears, therefore, that the amendment did not constitute a new cause of action, inconsistent with that set forth in the original declaration. The amendment was properly allowed by the lower court. It was not the beginning of a new action; but the suit should be treated as having been commenced at the time of the filing of the original declaration, which was done within the two years allowed in such cases. The demurrer to the plea of statute of limitation filed by the appellee in the lower court should have been sustained and for this error the judgment of the lower court is reversed and the case remanded. Curtice v. Railway Co., 162 Wis. 421, 156 N. W. 484, 1916 D., p. 316; M. K. & T. Ry. Co. v. Wulf, 226 U. S., 570, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914 B, 134."

Wisconsin:

Curtis v. Chicago & No. Wes. Ry Co., 156 N. W. Rep. 484 (162 Wisconsin, 421), discussed under Supreme Court rulings.

Kentucky:

Baltimore & Ohio R. Co. v. Smith, 184 S. W. Rep. 1108 (169 Kentucky, 593,) discussed under Supreme Court rulings.

Louisiana:

Illinois Central Ry. Co. v. Lanis, 72 So. R. 78 (140 Louisiana, Page 1) discussed under Supreme Court rulings.

It is respectfully submitted that the foregoing is an overwhelming weight of authority against the defendant's contention. I fail to find in his brief the citation of a single authority in any way criticising or overruling the foregoing.

He relies upon two cases in the Supreme Court:

DISCUSSING CASES RELIED UPON BY PETITIONER

The first is the case of

Union R. R. Co. v. Wyler, 158 U. S., 285; 15 S. C. R., 877.

In explaining and distinguishing this case from the Wolff case, Judge Pitney said:

> "But in that case, as is made plain in the opinion delivered by Mr. Justice White, now Chief Justice, *the amended petition set up not only a different state of facts, but a different rule of law* as the ground of the action. The original petition proceeding exclusively on the common law rule which held a master liable, who, with knowledge, employs or retains an incompetent servant, and making no reference to the Kansas statute, nor averring negligence on the part of the fellow servant, excepting so far as this might be inferred from the averment of his incompetency; while the amendment relied upon the fellow servant's mere negligence, together with a statute of Kansas which made the master responsible for the consequences of the negligence of a fellow servant. The action having been commenced in a Missouri court which would not take notice of the Kansas statute unless it

were pleaded, this Court held that the rule that the Federal courts take judicial notice of the laws of the several states did not apply." (Italics ours).

How can this case be an authority for an action brought in the State Court that has jurisdiction over actions under the Federal Employers' Liability Act where the only amendment sought is that "at the times and in the manner above set forth, the parties were then and there engaged in interstate commerce," and where both actions are based upon what the common law defines to be negligence?

The distinction pointed out between the Wyler case and the Wolff case by Judge Pitney certainly applied to us. As he said, referring to the Wolff case:

> "Since, in the present case, the Federal statute did not need to be pleaded, and the amended petition set up no new facts as the ground of action, the decision in the Wyler case is not controlling."

And, as he again said: as to an amendment setting up that the plaintiff sued as a personal representative under the Employers' Liability Act, which amendment was made more than two years after the cause of action accrued,

> "Nor do we think that it was equivalent to the commencement of a new action so as to render it subject to the two years limitation prescribed by Section 6 of the Employers' Liability Act. The change was in form rather

than in substance. It introduced no new or different cause of action, nor did it set up any different state of facts as the ground of action, and, therefore, it related back to the beginning of the suit."

Defendant's other reliance is upon the *Rowe case* (241 U. S., 230).

Defendant's view in this case is completely answered by the Court's statement in the Newberry case (276 Fed. *supra*).

In *Trowell v. D. L. & W. R. R. Co.*, 227 U. S. 434; 33 S. C. R., 274.

Suit was commenced by a widow and surviving children of deceased individually under a statute of Pennsylvania. The case was tried out and plaintiff failed. A second action was brought under the Federal Act, but within the two years, so no Statute of Limitations was involved. It was urged by defendant that the judgment in the first action was a bar to the second. The Supreme Court disagreed with this on three grounds:

First: That the remedy first taken was a mistaken one, which did not prevent plaintiff from pursuing the second and proper remedy.

Second: That the issues involved in the second action were not adjudicated at all in the first, and, therefore, the judgment in the first was not a bar.

Third: The parties were not the same, the widow and children suing individually in the first action and the administratrix in the second.

Gulf, Colorado & Sy. Co. v. McGinnis, 228 U. S., 173; 33 S. C. R., 426.

No question involved in the case at bar was presented in the above cited case.

Hogarty v. Philadelphia & R. Ry. Co., 225 Pa., 236.

The Pennsylvania court holds that after an action has been brought in a common law action in the state court and has failed, after proceeding to judgment, that plaintiff is not entitled to have the case remanded for the purpose of amending.

The misapplication of the case last above cited is illustrated by the evident misapplication of

Walker v. Iowa Cent. R. R. Co., 161 Fed., 260.

In that case the petition, it was held, did not state a cause of action under the Federal Act. After the determination of the action, plaintiff ought to amend. The court said:

> "If, however, the amended petition under consideration had been presented during the pendency of the action in the Circuit Court and before its determination in that court, it might very properly have been permitted to stand, and, if sustained by sufficient proof, would, undoubtedly, have supported a judgment under the Act of Congress."

In *Allen v. Tuscarora Valley R. R.*, 229 Pa., 97 the action is brought at common law to recover for injuries to plaintiff in the State Court of Pennsylvania. Four years afterwards, and after any action under the Federal Safety Appliance Act was outlawed, the complaint was sought to be amended and the cause of action changed to one under the Safety Appliance Act. This case is not applicable because there was some reason for saying that the Safety Appliance Act does create a cause of action different from common law cause of action for injuries on the ground of negligence.

Insofar as the Pennsylvania cases above cited affect the question under the Federal Employers' Liability Act, they are not only directly contrary to the Payne case and others in our state on the subject, but also against the decision of the Supreme Court of the United States.

In *Hall v. Louisville & N. R. Co.*, 157 Fed., 464, an action was brought by the widow of deceased individually under the Florida statute. It was held that the complaint could not be amended by substituting the administratix and thus bringing the case under the Federal Act. That case was overruled by the Supreme Court of the United States in the Wulf case (226 U. S., 570) where it was held that that very thing could be done, and in this Circuit by the Newberry case (276 Fed. *supra*).

In *Fort Worth & R. G. Ry. Co. v. Bird*, 196 S. W., 597, the action was originally brought in a state court under the Texas statute giving the cause of action. It was held that plaintiff could not depart from such cause of action and resort to the Federal Act after two years.

The same was held in *Findlay v. Coal & Coke Ry. Co.*, 87 S. E. 198, and both these decisions are overruled by the Seal case, 243 U. S. 630, 171 S. W. 512, 160 S. W. 317, *supra*.

The case of *Hughes v. N. Y. O. & W. R. R. Co.*, 158 A. D., 443, was overruled by the Supreme Court of the United States in the Wulf case (226 U. S., 570).

The Kinney case (opinion by Justice Wheeler, set out at length at Page 47 of the brief) was one of the phases of this particular action, and Justice Wheeler was unanimously reversed by the Appellate Division (185 A. D., 903).

In the case of *Walker v. Iowa Central Ry.*, 241 Fed., 395, is a District Court decision, and apparently relates more particularly to questions of practice in Iowa, and is overruled by the Smith, as administratrix of Seale case, *supra, et al.*

In the case of *Atlantic Coastline R. Co. v. Burnett*, 239 U. S., 199 (36 S. C. R., 75) no action of any kind was brought for three years.

The case of *American R. R. Co. of Porto Rico v. Didricksen*, 227 U. S., 145 (33 S. C. R. 224) relates to the survival of a cause of action after the death of the beneficiary, and has nothing to do with the issues here.

It is, therefore respectfully submitted:

1st: That neither the Weiler case nor the Renn case is authority for the petitioner's claim.

2d: That this court has expressly overruled his claim in the *Wulf* case, the *Seale* case, the *Slavin* case, the *Koennecke* case, the *Hayes* case, the *McAdow* case, the *Smith* case, the *Lanis* case, and the case of *Smith v. B. & O.* and the *Curtice* case.

3d: That the Circuit Court of Appeals in the First, Fourth and Fifth Circuits has expressly held that an amendment like that in the case at bar does not set up a new cause of action or invoke the Statute of Limitations.

4th: That every state court of last resort before whom the question has come, except the State of Pennsylvania, has decided adversely to the petitioner's contention.

5th: That the practice adopted in this case by the courts of the State of New York is in accordance with its rules of practice adopted from time immemorial.

6th: That the right of the plaintiff to recover is clear without considering any question of amendment, and finally, that the allowance or disallowance of the amendment is a matter of state practice.

It only remains to answer what the petitioner evidently regards as his culminating argument found on Page 31 of his brief. He says, assume that by final judgment the plaintiff had been defeated in his action under the State Act, could he then bring a new action under the Federal Act?

In this case the plaintiff has not been defeated under the State Act. His law suit is just as much alive as if it had never been tried. There was, it is true, a question of fact as to whether the plaintiff was engaged in interstate commerce. The determination of that question of fact determined the law to be applied. *If the plaintiff had done nothing but serve a summons, and had filed no pleading until after the two years had expired, could the defendant be heard to complain that the cause of action was outlawed because interstate commerce had not been plead within two years?*

The original action was brought for Twenty-five Thousand Dollars. The amendment, made more than two years afterwards, increased the amount prayed for to Fifty Thousand Dollars. The net verdict is for Thirty-two Thousand Dollars.

Every argument that the petitioner has made to support the claim that a new cause of action has been set up would apply to the prayer for additional relief, and tend to establish the absurd proposition that while a verdict for Twenty-five Thousand Dollars might be proper, any increased sum sought for after two years had expired was outlawed.

The original complaint, which is before the court, set forth every act of negligence for which a recovery was had. The amendment merely amplified and gave greater precision to it. As Judge Van Devanter said, when sitting in the Eighth Circuit, in the case of *Crotty v. Chicago Great Western Ry. Co.*, 169 Fed., 593, where the question of the running of the Statute of Limitations was raised because an additional allegation of negligence had been set out in a complaint where a trial had been had and plaintiff had failed.

> "The excerpts from the petition and the amendment hereinbefore set forth make it plain that such negligence was intended to be, and was substantially, charged in the petition, and that the amendment, instead of presenting a new charge, merely amplified and gave greater precision to one already presented. And, this being so, the case was well within the rule that an amendment to a petition which sets up no new cause of action, demand, or charge, but merely amplifies and gives greater precision to the allegations in support of the cause of action, demand or charge originally presented, relates back to the commencement of the action, and the run

ning of the statute of limitations against the cause of action, demand or charge so pleaded is arrested at that point. Whalen v. Gordon, 37 C. C. A. 70, 95 Fed. 305; Patillo v. Allen-West Commission Co., 65 C. C. A. 508, 131 Fed. 680; Hutchinson v. Otis, 190 U. S., 552, 555, 23 Sup. Ct. 778, 47 L. Ed. 1179; Thayer v. Coal Co., 129 Iowa, 550, 105 N. W., 1024 Gordon v. Railway Co., 129 Iowa, 747, 106 N. W., 177."

This is not a case where the plaintiff has been silent and let his rights lapse. On the contrary, he has been asserting them in every way he knew how for thirteen years. As Judge Buffington said in the case of *Klumpp v. Thomas,* 162 Fed. Rep., 853 (writ denied by the United States Supreme Court, 29 S. C. R., 688):

> "Statutes of limitation are statutes of repose, and are based on the likelihood that inaction for a protracted period would not occur unless a settlement had been made. But where litigation is going on, where the parties are using legal proceedings to effect a settlement, it would be at variance with the principles underlying limitations to hold that such statutes were then running."

POINT TWO.

There was evidence to support the finding of the jury that at the time of the accident, the parties were engaged in interstate commerce.

Under our New York State practice the unanimous affirmance of the Appellate Division of a

finding of fact is conclusive at least on our courts.

Art. 6, Sec. 9 New York State Constitution Sec. 191, Subd. 3, Code of Civil Procedure, now Subd. 3, Sec. 589 of Civil Practice Act.

The order allowing the appeal certified only questions of law to the Court of Appeals. (Page 623). This does not include a question of whether there is any evidence to support a finding of fact.

Nesserven vs. Hoyt, 161 N. Y. 61.

Cronin vs. Lord, 161 N. Y. 90.

The unanimous decision of the Appellate Division in the Fourth Department precluded the defendant from reviewing this question in the Court of Appeals under the New York State practice and statutes.

Sec. 191, Subdivision 3, Code of Civil Procedure.

Article 6, Sec. 9, New York State Constitution.

Nesserven & Cronin cases, *supra.*

The jury on the trial which preceded the trial under review had so found. (Page 7 of petition).

Ample evidence to support the finding was given by witnesses, most of whom were in the employ of the defendant. The plaintiff was taking cars from a yard close to the International Bridge over the Niagara river, and the cars were coming from

certain tracks on which the plaintiff's witnesses swore nothing but cars from the Canadian side were placed. Kinney was turning around for the purpose of taking a train from these tracks.

(See testimony of plaintiff, Page ~~88~~ 51; testimony of defendant's conductor, Pages ~~597 to 603~~ 3 2 6).

The principal evidence on the subject was given by the defendant's yardmaster, whom the plaintiff had subpoenaed and forced to disclose the facts (Pages ~~50 to 55~~ 24-25). Other testimony was given by former employees of the defendant (Pages ~~66 and 67, 71, 89~~ 34-36. 44-4). The defendant, although required to do so, failed to produce the car records and claimed that some other freight sometimes got on these tracks and that they were not exclusively reserved for Canadian cars. Whether they were was for the jury, there being evidence to support the claim. If they were, then the plaintiff and defendant were engaged in interstate commerce.

Seaboard Airline Co. v. Koennecke, 239 U. S., 352; 36 S. C. R., 126.

Carr v. N. Y. C. R. Co., 238 U. S., 260; 35 S. C. R., 780.

Pennsylvania R. Co. v. Donat, 239 U. S., 50; 36 S. C. R., 4.

The plaintiff proved the general order of business, and the burden of proving an exception to that general order of business rested on the defendant.

Erie R. Co. v. Krysanski, 238 Fed., 143.

The defendant says in his brief that the records are destroyed. (Page 74). The cross-examination of the witness who swore to this at page 483 shows that the witness was testifying from hearsay, (pp. 482, 483); that he knew where the records would be kept and hadn't looked for them. Also he had been asked to produce them on this trial and on the trial before. No matter what the plaintiff knew in the early stages of the litigation, the defendant knew whether or not the movement was interstate and the jury had a right to view his statement that this important record in a pending litigation had been destroyed with suspicion. This is not the only record that might help the plaintiff that has disappeared in this lawsuit. A complete record of the engine was attempted to be procured by the plaintiff. (Page 164). Most of these the defendant claimed had burned up (Page 168) and this fire occurred about the time of the first trial. The jury were justified in viewing this claim with suspicion.

POINT THREE.

The charge complained of was withdrawn and the court later charged the rule of assumed risk contended by the defendant.

On the trial at the request of the trial justice both sides presented requests in writing in advance. These requests were necessarily voluminous in view of the fact that the theory upon which

the case was to be decided depended on what the jury found on the subject of interstate commerce. The rules governing assumed risk were different if the jury decided that the suit was under the State Act than they would be if they held the Federal Act applicable. Whether or not it was applicable was a question of fact, and the assumption of risk depended in part upon that fact. Of course, it was not known in advance whether the court would submit the question to the jury under the State Act or the Federal Act or whether he would leave it to the jury as a matter of fact. Therefore, many of the requests submitted by both sides became useless as soon as the attitude of the court was known. The court took up these requests one by one and counsel indicated which ones were withdrawn as appears at pages 592 and 595. The same course was adopted as to the defendant's requests. Mr. Spratt withdrew many of his requests in the same language used by Mr. Ward. (pp. 598 to 602).

Under the State Law which would have applied had the jury found that the parties were not engaged in interstate commerce, the question of assumed risk is regulated by statute and whether or not any risk is assumed is a question of fact.

New York State Employers' Liability Act, Sec. 202 of Labor Law.
Fitzwater vs. Warren, 206 N. Y. 355.

Ordinarily this is not the rule in an action under the Federal Employers' Liability Act, but

even there it sometimes is a question of fact whether the ordinary risks of business are assumed. Among these exceptions are situations where a promise of repair or a specific assurance of safety has been given. That was the situation in this case. The plaintiff had been told that the engine was all right and that he should take it out. (Fol. 373) and no trouble had developed in the obstruction of his view from the escape of steam before the moment of the accident. (Fol. 117). This, of course, affects the risks to be assumed both under the State and Federal practice.

New Aetna Portland Cement Co. v. Hat 231 Fed. 611.

Rice vs. Eureaka Company, 174 N. Y. 385.

Seaboard Air Line vs. Horton, 239 U. S. 595; 36 S. C. R. 180.

Southwestern Brewery Co. vs. Schmidt, 226 U. S. 162; 33 S. C. R. 68.

After the withdrawal of the request complained of the court fully and clearly charged the law now contended for by the ~~respondent~~ plaintiff. He charged:

> "Kinney can not be charged with the assumption of the risk arising from the defective engine and from the steam escaping for that reason, unless the defect and the danger arising therefrom were both known to him or were so obvious that it must be determined that they would be observed and known by a person of ordinary prudence." (Fol. 1100).

He charged in the language of the Harvey case, 228 U. S. 319:

"The true test is not in the exercise of ordinary care to discover dangers by the employe, but whether the defect is known or plainly observable by him. An employe is not charged by law with the assumption of risk arising out of defective appliances provided by his employer, unless his employment was of such a nature as to bring to his attention and cause him to realize and comprehend the dangers incidental to the use of such appliances." (Fol. 1101).

He charged in the language of the Hall case, 232 U. S. 94:

"An employee assumes the risk of dangers normally incident to the occupation in which he voluntarily engages, so far as these are not attributable to the employer's negligence. But the employee has a right to assume that his employer has exercised proper care with respect to providing a safe place to work, and suitable and safe appliances for the work, and is not to be treated as assuming the risk arising from a defect that is attributable to the employer's negligence, until the employee becomes aware of such defect, or unless it is so plainly observable that he may be presumed to have known of it. Moreover, in order to charge an employee with the assumption of risk attributable to the defect due to the employer's negligence, it must appear not only that he knew, or is presumed to have known of the defect, but that he knew, it endangered his safety; or such danger must have been so obvious that an ordinary person under the circumstances, would have appreciated it."

He charged in the language of the Horton case, 233 U. S. 492:

"Risks not naturally incident to the occupation, may arise out of the failure of the employer to exercise such care with respect to providing a safe place of work, and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair, and of the risk arising from it, unless defect and risk alike arising are so obvious that an ordinarily prudent person, under the circumstances, would have observed and appreciated them." (Italics ours).

All this at the request of the plaintiff.

At the request of the defendant he charged:

"That if the plaintiff had notice on his first trip to Tonawanda that the escape of steam from the engine would interfere with his taking dwarf signals, and he did not exercise his privilege of sidetracking his engine, or sending another engine, in his return to East Buffalo, but started on his trip to Black Rock, that he assumed the risk of the continued leaking of steam at the time of the accident.

"That I will find as requested with this modification, that if Kinney knew of the defects in the engine when he started or discovered them while enroute on his trip, he cannot be charged with assumption of risk unless he knew and appreciated the particular danger arising therefrom in the obstruction of his vision in preventing him from seeing the dwarf signal at the critical moment of the accident, or as he approached the dwarf, or unless such danger was so obvious that a person of ordinary prudence must be presumed to have known and appreciated it, and in that behalf any evidence that the escaping steam

previous to the time that he was approaching the dwarf did not obstruct his vision or prevent him from seeing the signals, should be considered by the jury."

"That if when Kinney started to proceed with his engine from Tower "J" to Tower 10 against the current of traffic, he was aware of the fact that the steam from his engine was overlapping and would so envelop the engine that it would interfere with his seeing either the dwarf signal, or Mullen's signals, or both, and he continued on with the steam enveloping his engine and interfering with his view of the signals, that he assumed the risk of any injury resulting, because of the steam escaping from the engine."

This was his last word on the subject and it is what the defendant now contends for. The case was a very complicated one, in view of the different elements of liability under the different laws and it is respectfully submitted that the charge of the learned court was remarkably free from error.

In fact his charge on the subject of assumed risk was more than the defendant was entitled to. In the

Kreps case, 239 U. S. 176, 36 S. C. R. 154,

Judge Pitney says:

"The burden of proof of the assumption of risk was upon the defendant and unless the evidence tending to show it was clear and free from unimpeached witnesses and free from contradiction, the Trial Court could not be charged with error in refusing to take the question from the jury."

We also rely on the case of

Chi. R. I. & P. R. R. v. Ward, 252 U. S. 18, 40 S. C. R. 275.

And the case of

Gila Valley R. Co. v. Hall, 232 U. S. 94, 34 S. C. R. 251.

The question of escaping steam is not the turning point in the lawsuit as plaintiff had seen the green light at Hertel avenue (Fol. 114) and the fireman had announced the light as green. (Fol. 113), and the rules of the company provided that the signal could not be changed until Kinney came to a stop. Rule 18, folio 121. The defendant's tower man in charge of the signal admitted this and testified:

"Q. If Mr. Kinney had been given the green light, did you have any business to change the switches and give lights to the other trains on the other track?

A. No, sir.

Q. That would have been contrary to the rules, wouldn't it?

A. Yes, sir.

Q. That is, if he saw that light he had a right to assume that he could proceed out on the main track, didn't he?

A. That was his indication.

Q. That told him just as plainly as words could tell it that the switches were set for him, and they are set against movements on the main track?

A. Yes, sir." (Fol. 538).

Therefore, it is our contention that the escaping steam involved no risk to Kinney if he had

once been given the signal. It is claimed by the defendant under this Point that it was Kinney's duty to turn the engine in as soon as a leak developed. Kinney says that this is not so. (Fol. 157), and it is significant that none of the three engineers who previously used the engine and who found it leaked steam did this. In fact, one of them made another trip at the request of the defendant after the leak developed (Fols. 342, 346, 347, 367). Prior to the accident the escaping steam had not interfered with the plaintiff's view of signals. (Fol. 117).. The coming darkness, the wind, and the change in the direction of the engine caused it to give this trouble for the first time. (Fol. 117). Certainly it was a question of fact whether Kinney should have anticipated this and also whether under the rule and practice referred to, he was under any obligation to continue to observe the signal after having once seen it green. It was not in his power to shut the steam off, as defendant states, as some of the leaks were from the belly of the boiler. (Fols. 117, 149). In spite of the steam he was able to see the signals of Mullen and testified:

"Q. Did it interfere with your seeing Mr. Mullen's signals?

A. No, because Mr. Mullen's signals was up higher." (Fol. 117).

"Q. And you continued to receive those come-ahead signals from Mr. Mullen down to that point?

A. The point of the accident." (Fol. 118).

And the jury have found this to be so, because the court charged at the request of the defendant:

"That if at any time Kinney was in doubt as to what the signals given were, whether the signal from the dwarf or the signal from the lantern of Mullen, then it was his duty under the rules to stop." (Fol. 111).

"That if the jury find that Kinney was uncertain as to whether Mullen's signal was a stop signal or a come-ahead signal, and that Mullen's signal was in fact a proper stop signal, and that the defendant was not negligent in any other respect claimed, then the failure of Kinney to stop before passing the dwarf must be considered contributory negligence which was the sole cause of the accident and which bars a recovery."

If as a matter of fact, Kinney was negligent in misreading Mullen's signals, it is submitted that this is contributory negligence and not assumed risk and that the jury have found contributory negligence and reduced the verdict accordingly. Kinney did not assume the unexpected risks that arose and in any event even if Mullen had been giving him no signals at all, he had a right to rely on the green light not being taken away as we have seen. This was pointed out by Judge Hiscock when the case was first in the New York State Court of Appeals, when he said:

"There were interlocking signals and if the light which it gave plaintiff was green, he had the right to assume that trains would be stopped on the passenger track and that he might go where he did."

217 N. Y. 328.

In his argument under this Point, the defendant confuses assumed risk and contributory negli-

gence. If Kinney failed to properly read Mullen's signals because of the steam which then for the first time obscured the signals, although he says he was able to read Mullen's signals, at all times, this is contributory negligence and not assumed risk. The jury were fully and clearly charged on the subject and the effort of the defendant to bring into this case a withdrawn request which has not been found error by the highest court of the State of New York, does not rise to the dignity of a question for this court.

That a request may be withdrawn and that a party may disclaim the benefit of an erroneous statement of law has been held by the New York Court of Appeals in

Klumpp v. N. Y. C. R. Co., 179 A. D. 279, 226 N. Y. 666.

One seeking a benefit of an exception must definitely point out the error.

Clark v. N. Y. C. & H. R. Co., 191 N. Y 416.

Defendant argues this case as if engines leaking steam to such an extent that they obscured signals were common things, and then claims that this engine did not do so. Certainly if it did do so at the moment of the accident, the risk was sudden and unexpected and such a risk is not assumed.

C. & O. R. R. Co. v. Proffit, 241 U. S. 462, 36 S. C. R. 620.

C. & O. R. R. Co. vs. DeAtley, 241 U. S. 310, 36 S. C. R. 564.

Defendant says:

"If defendant gave a stop signal but Kinney failed to properly read it because of the escaping steam, then we assert that this was one of the risks incident to his employment which he assumed as a matter of law." (p. 84 of brief).

This is a question of fact:

As Judge Clark said in the latest case on assumed risk:

So. Pac. R. C. v. Berkshire, (decided Jan. 3, 1921, and reported in 41 S. C. R. 162) quoting from the case of Railway Co. v. Hall, 232 U. S. 94-104; 34 S. C. R. 229, 231):

"In order to charge an employee with the assumption of a risk, attributable to a defect due to the employer's negligence, it must appear not only that he knew (or is presumed to have known) of the defect, but that he knew that it endangered his safety, or else such danger must have been so obvious, that an ordinary prudent person, under the circumstances, would have appreciated it."

It was only when the servant, whose duty it was to see what Kinney could not see, also failed that the obstruction to Kinney's view of the dwarf became important. The signal man was placed ahead on the leading car for the particular purpose of protecting Kinney, whose view was nec-

essarily obstructed by the car itself. This negligence of the signal-man the jury has found, and it would seem that it was only in combination with this negligence that the escape of steam became harmful, and that Kinney cannot be charged—certainly not as a matter of law—with assuming a risk or danger, one necessary and essential element of which is the unexpected negligence of a fellow servant.

Chicago, R. I. & P. R. Co. vs. Ward, 252 U. S. 18; 40 S. C. R. 275.

POINT FOUR.

There was no error under the charge complained of in defendant's Point Four.

The law on the subject is quite fully discussed in the preceding point and the charge of the court *subsequent* to this is given.

The courts have always said that it was not unexpected, unusual or extraordinary risks that were assumed.

Again we point out that after Kinney saw the green light, there were no risks to be assumed unless the defendant violated its own rule and changed the switches before Kinney stopped. Kinney's cause of action rests on this. Judge Bissell told the jury that unless Kinney saw the light green when he was at Hertel avenue, he could not recover. (Fol. 1090).

It is, therefore, the law in this case that the jury so found. Knowing this, Kinney also knew that he had a right to go out on the main track, and was protected in so doing unless the defendant violated its own rules. It would seem idle to argue that he was charged with assuming any such risk.

The defendant's argument in his third and subsequent points all partake of the same error. He is asking the court to charge that Kinney assumed the risk of certain general conditions. These conditions are not simple conditions, but complex conditions. It was an extraordinary accident to which there were three essential elements: (a), the defective or imperfectly displayed signal; (b), the negligence of the signal-man on the head car; (c), the escaping steam.

No danger from the latter existed without the mistaken light and the negligent signal-man. To tell the jury that Kinney assumed *all* the danger in which the escaping steam was involved necessarily required a ruling that he assumed the danger of the defendant's other negligence without the existence of which the escaping steam would have been harmless. Even if he had known of the escaping steam, he certainly had a right to assume that the signal once displayed to him, which justified him in proceeding, would not be changed, and that the signal-man who was ahead of the steam, and whose signals could be seen by Kinney, would give him a correct signal.

We have no quarrel with the authorities cited by the defendant under this point.

POINT FIVE.

There was no error in the charge of the court under this point, for the reasons before stated.

POINT SIX.

The ruling complained of relates to contributory negligence.

This has been found against the plaintiff by the jury and the verdict reduced Eight thousand dollars because of it, but, nevertheless, there was no error.

The request was that if the towerman changed the light "after Kinney reached a point where he could not see it," he was not chargeable with knowledge of it, etc.

This is another of the appellant's straw men. He argues as if the court had charged that Kinney was under no obligation to make any further observations after he first saw the light. On the contrary, the court repeatedly charged Kinney with every obligation in the matter.

"The Court: (Reading). 'That even though the jury finds that the light on dwarf

6 was green when Kinney claims to have seen it, that if before he reached or passed it it was changed to purple, or danger,'—I suppose you can insert there that he saw it—

Mr. Spratt: Or ought to have seen it.

The Court: Or ought to have seen it. I will put it that way. '—that it was his duty to stop.'

Mr. Ward: Yes, I consent to that as amended." (Fol. 1109).

"Mr. Spratt: I am in a little doubt about that. I would like to have your Honor charge it.

The Court: I think I have already charged the proposition pretty clearly, but I will charge it again. 'That if Kinney was in doubt as to the color of the light on dwarf No. 6, whether it was green or purple, it was his duty to stop before passing it.' That is under the rule to which I have drawn the jury's attention.

The eleventh, I have granted that also, 'That if Kinney could not see the dwarf light and was depending entirely on Mullen's signal and was in doubt as to whether Mullen's signal was a come-ahead or a stop signal, it was his duty to stop before passing the dwarf, and if he failed to do so, he was negligent.' That is granted.

Mr. Spratt: I withdraw twelve and thirteen." (Fol. 1111).

"The Court: Fourteen, 'That if at any time Kinney was in doubt as to what the signals given were, whether the signal from the dwarf or the signal from the lantern of Mullen, then it was his duty under the rules to stop.' That is pursuant to the rule which has been drawn to the attention of the jury.

The fifteenth, I have granted.

Mr. Spratt: That is also withdrawn.

The Court: The sixteenth I have granted.
Mr. Spratt: I would ask that." (Fol. 1111).

"The Court: I will grant that with a slight modification, I think. It reads, 'That if the lantern signals which the plaintiff saw Mullen give were seen by him to extend from the horizontal line of Mullen's outstretched arm, and to disappear each time on the downward swing, past the vertical line of Mullen's body and the right hand corner of the caboose'—the way it was drawn here it was that 'the jury must find that Kinney received the stop signal and that he should have recognized it as such.' I will not charge the latter part. I will say that the jury may find from the evidence which they believe that Kinney received the stop signal and that he should have recognized it as such." (Fol. 1112).

"The Court: Now, twenty-six, that I have granted as modified, so that I will read that, 'That if the jury find that Kinney was relying solely on Mullen's hand signal, and if they find further that Mullen was not negligent in the manner in which he gave the hand signal, and that his signal was in fact a stop signal, and that the steam escaping from the engine did not interfere with Kinney's observation of Mullen's signals, and that the defendant was not negligent in any other respect claimed, then if Kinney was uncertain as to whether Mullen's signal meant a stop signal or a come-ahead signal, the failure of Kinney to stop before passing the dwarf must be considered contributory negligence, which was the sole cause of the accident and which bars a recovery." (Fol. 1115).

"The Court: Now comes twenty-seven. That I have modified. The request is, 'That if the jury find that Kinney was uncertain as

to whether Mullen's signal was a stop signal or a come-ahead signal, and that Mullen's signal was in fact a proper stop signal, and that the defendant was not negligent in any other respect claimed, then the failure of Kinney to stop before passing the dwarf must be considered contributory negligence, which was the sole cause of the accident and which bars a recovery.'

Mr. Ward: I consent to that.

The Court: You consent to that without modification?

Mr. Ward: Yes.

The Court: So that we will let that stand. You are so charged." (Fol. 1116).

"Twenty-eight is the next. I have granted it. It reads, 'If Mullen's hand signals were properly communicated to Kinney and showed a proper stop signal, the defendant cannot be charged with liability solely because Kinney misinterpreted the signal.' I will grant that." (Fol. 1116).

And in this I believe the court erred in favor of the defendant, as no such duty was imposed on Kinney, in the opinion of this court, on the first trial. He had a right to rely on the defendant's observance of its own rule and practice after having once seen the light. (See testimony of Dowd, page 33; Dorgan, page 196; Kinne, page 186, and Peck, page 129).

Nevertheless, it was because of the charge of Judge Bissell that he owed further obligations that the finding of contributory negligence and the corresponding reduction in the verdict was made by the jury.

This request relates to contributory negligence, and as that has been found, I fail to see how the defendant can complain.

POINT SEVEN.

There was no error in the charge referred to by the defendant under this point.

A reading of the charge complained of will show the court that it has no connection with the matter argued.

Mullen had admitted that when he was giving the signals he stood with his back against the caboose, which was ahead of Kinney, instead of leaning out where Kinney could see him. This was his testimony on the first trial of the action, and while in the subsequent five trials he tried to depart from it, nevertheless, when pressed, had always admitted its truth. (Fols. 643-649). So that, from this position, if he had been giving a stop signal, the part visible to Kinney would have appeared to be a proceed signal. This was demonstrated on the witness stand by a number of locomotive engineers in the employ of the defendant, and who were subpoenaed and sworn by the plaintiff. (See Fols. 244-246-249).

Of course, it made no difference what signal Mullen was giving, unless he was giving them in such a position that Kinney could see them. That was what the court charged, and not, as the de-

fendant claims in his point, that Kinney was excused from reading "plain stop signals." There is no such language in the charge, and the point made is another straw man raised by the defendant to protract this litigation, which has now lasted for thirteen years.

The plaintiff, in the prime of life, lost one leg; had the other permanently crippled and received a crushed pelvis. The issue litigated on six trials was whether or not the plaintiff received a come-ahead signal from a fixed light as he approached it at a time when he had a right to assume that he could be governed by it. Everything else was incidental. Only three persons were in a position to see this light. One of them, the signal man, although claiming that the light was set against him remained in his position until the moment of the collision, and failed to apply his brakes or take any steps to prevent it; the other was Kinney, a careful and experienced engineer, who not only swore that the light was in his favor as he approached it, but that the fireman so announced it to him. On all of the six trials the fireman was in the court room, and *in the defendant's employ, but was never sworn.* Four juries that listened to Kinney believed him, and found in his favor. One jury disagreed, and one found against him through an erroneous direction of the court.

As was said in the history of the case, reported in (98 Misc., page 8), through no fault of the plaintiff or his counsel, he has lost the benefit of

three verdicts, verdicts rendered where the jury found that there was no blame whatever on the plaintiff. It would seem that the defendant has little to complain of when the jury has found that the plaintiff was in part to blame for the accident and has reduced the verdict accordingly.

In conclusion, the maker of this brief desires to apologize to the court for its undue length. The issue has involved almost every element of railroading. Each trial has lasted about two weeks and it has taken that time in each case to make the issue plain. Even with the length of this brief, counsel despairs of making any adequate presentation of the facts.

Every lawyer has one lawsuit in his life that stands out. I have been at this lawsuit for fourteen years and now as I leave it with the highest court in the world, I feel the inadequacy of my presentation, and I tremble at the reflection that the delay of justice may have been due to that in the past.

POINT EIGHT.

It is respectfully submitted that the petition for a writ of certiorari should be denied; that there is no plain or manifest error in this case and no question requiring the intervention of this court.

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Office Supreme Court, U. S.
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JAMES D. MAHER,
CLERK

IN

Supreme Court of the United States

OCTOBER TERM, A. D., 1921

No. 391 110

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Petitioner

vs.

JOHN W. KINNEY, Respondent.

REPLY BRIEF OF PETITIONER

MAURICE C. SPRATT,
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HERBERT W. HUNTINGTON,
of Counsel.

IN THE

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OCTOBER TERM, A. D., 1921

No. 391.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Petitioner,
vs.
JOHN W. KINNEY,
Respondent.

REPLY BRIEF OF PETITIONER.

On page 1 of respondent's brief this statement is made:

> "The plaintiff, a locomotive engineer employed by the defendant, while engaged in moving **certain cars which had just reached Buffalo from Canada,** was involved in a collision"

Respondent's reply brief was served on petitioner late in the afternoon of September 29, 1921, and it is therefore impossible to examine the same, prepare and have printed and filed a

complete reply brief by Saturday, October 1st, as required by the rules of this Court.

We wish, however, to emphatically assert that the statement that the cars being moved had just reached Buffalo from Canada is an absolute misstatement of the fact, and entirely inexcusable.

There is not a scintilla of evidence in the record bearing out this statement. No witness sworn in the case offered even a suggestion as to the time of the arrival of the cars in question from Canada or elsewhere. On the contrary, every witness conceded that they had no actual knowledge of the character of the cars on this track on the night in question. Plaintiff's theory was that this track was used exclusively for interstate commerce. This, we assert, he failed to establish. Under Point II of our brief, filed with the petition herein, we urged that the verdict of the jury in this respect was without support in the evidence, and was based solely on speculation and conjecture.

We direct the Court's attention to the testimony in the record and confidently assert that the statement challenged will be found to be without the slightest evidence to sustain it.

(See Record Pages 46-77, 89, 210, 603, 793, 794, 797, 854-885).

The record of these cars had been destroyed in the usual course of business, long before the amendment setting up interstate commerce was allowed. The vice of the amendment is here em-

phasized. With the record, by which the defendant might have flatly refuted even the suggestion of interstate commerce, destroyed, plaintiff after a lapse of ten or more years, attempts, as the record discloses, to prove interstate commerce by the speculation and conjecture of witnesses, who admittedly had no actual knowledge of the situation. For the obvious purpose of misleading the court, and bolstering up a hopeless record, respondent makes the bald assertion that the cars *had just reached Buffalo from Canada.* In view of respondent's knowledge of the facts, such a misstatement is unpardonable.

We regret that time will not permit a complete reply to respondent's brief.

Respectfully submitted,

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THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Petitioner,

vs.

JOHN W. KINNEY, Respondent.

Answering Brief of Respondent

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1921.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, *Petitioner,* vs. JOHN W. KINNEY, *Respondent.*	No.....

ANSWERING BRIEF OF RESPONDENT.

This has been one of the most sharply contested tort actions that has ever been conducted in the State of New York.

The plaintiff, a locomotive engineer employed by the defendant, while engaged in moving certain cars which had just reached Buffalo from Canada, was involved in a collision at a point governed by interlocking and manually controlled signals, and the question of the responsibility for the collision involved the examination of almost every question connected with practical railroading.

The original complaint set up the negligence of the defendant and the freedom from negligence of the plaintiff, as now relied on. While pleading all of the facts necessary to recover, no mention was made of the Federal Employers' Liability Act or the fact that the plaintiff and defendant at the time of the accident were engaged in interstate commerce.

The action was originally brought against another defendant in addition to the New York Central, viz., the Michigan Central, alleged to be a foreign corporation (Section 14), and which operates through Canada to Buffalo.

Upon the first trial a verdict of no cause of action was rendered as against the Michigan Central, and this defendant has since that time been out of the litigation. One of the trains involved in the collision was a Michigan Central train, but the signals were wholly controlled by the New York Central, who owned the tracks, which were jointly used by the two companies. This is admitted. (Fols. 14-62-147-1490.)

The early history of the litigation is found in 98 Misc. (N. Y. Reports), Page 8, in an opinion by Justice Bissell:

> "It also appears that through no fault of the plaintiff the three verdicts rendered in his favor have been set aside, and without a decision anywhere conflicting with the plaintiff's ultimate right to recover; that when the

case was tried the first time it was the law that a head-end brakeman giving signals was a vice-principal; that shortly after the rendition of the first verdict the Court of Appeals reversed the Appellate Division on this subject (in Hallock v. N. Y. O. & W. R. Co., 197 N. Y., 450), and held that a head-end brakeman was not a vice-principal; that this decision required the trial justice to grant a new trial, and thereafter a second verdict rendered, which was appealed from and reversed as against the weight of the evidence, in accordance with the decision in Dunn v. New York Central & H. R. R. R. Co., 149 App. Div., 932, which held that an engineer under similar circumstances was guilty of contributory negligence; that the third trial was then had, and in the meantime the Dunn case was reversed by the Court of Appeals (208 N. Y., 344), and under that decision the third verdict was affirmed in the Appellate Division; and that the last verdict was reversed by the Court of Appeals and a new trial granted in an opinion sustaining the plaintiff's contention as to negligence and freedom from contributory negligence, and basing the reversal solely on an error made by the trial court in passing on a request to charge made by the defendant."

Between the date of the third and fourth trial nearly five years elapsed, due to the case going to the Court of Appeals. After the first decision in the Court of Appeals, in which the right of the plaintiff to recover was upheld, although a new trial was granted, the plaintiff moved to amend his complaint to increase the amount of damage asked for, and also alleged:

"And plaintiff further alleges, upon information and belief, that both the plaintiff and defendant, at the times and in the manner above set forth, were then and there engaged in interstate commerce, and were subject to the provisions of an act of Congress known as the Federal Employers' Liability Act, which took effect in April, 1908."

This latter amendment was for the purpose of preventing the defendant from claiming surprise in case interstate commerce appeared upon the trial, as was indicated by the United States Supreme Court, in the case of

Toledo, St. Louis & Western R. Co. v. Slavin, 236 U. S., 454; 35 S. C. R. 306.

Upon an appeal from the order allowing the amendment the Appellate Division, the court of last resort in such matters, affirmed the order (177 A. D., 948).

Upon the fourth trial the jury disagreed. This trial was after the amendment but interstate commerce was not established. Upon the fifth trial the evidence was practically the same as at the present time, it being established that the parties were engaged in interstate commerce by competent proof. Judge Wheeler, however, charged that if the plaintiff was uncertain as to the character of Mullen's signal, his failure to stop before passing the dwarf must be considered contributory negligence, which was the *sole* cause of the accident, and which bars a recovery. The case

having been tried on the theory that negligence was comparative, and interstate commerce having been found by the jury, this charge, of course, was error, and resulted in a unanimous reversal in the Appellate Division, reported in (185 A. D., 903).

The case then came on for a sixth trial before Justice Bissell. The jury found negligence. The jury also found contributory negligence. They assessed the total damage and divided it in their verdict. The judgment and order arising therefrom have been unanimously affirmed by the Appellate Division. (190 A. D., 967.)

Leave to go to the Court of Appeals of the State of New York on questions of law only was granted to the defendant and the Court of Appeals affirmed the judgment in favor of the plaintiff. May 31 1921. Without opinion.

FACTS.

The respondent cannot agree with the petitioner's statement of facts. At least, the respondent claims that it merely presents the evidence favorable to the petitioner's contentions, but which has been found to the contrary by the juries which have passed upon the issues.

In order that the court may be in possession of sufficient facts to apprehend the bearing of the

questions of law presented, the following brief summary is made:

The defendant maintains a yard on the bank of the Niagara river near the International bridge, for the interchange of freight cars between the United States and Canada, and on one track in this yard places cars from Canada (136-229). Plaintiff, an engineer in the employ of the defendant, operating an engine in yard service, was ordered to take these cars off this track and carry them to East Buffalo (1789-1791; 1809, 264). To do this the engine had to be turned around, and as there was no turn table, the plaintiff had to use the "Y" in making the turn. He had permission to do this, and it was in making this movement that the accident occurred.

At the point in question all train movements were controlled by interlocking block signals, and freight and passenger local and through movements were intermingled. A dwarf signal, known as No. 6, controlled the movement of the plaintiff and *authorized his going out on the main track if set in his favor.* As Kinney approached it he was pushing a caboose, and located on the front end of the caboose was a brakeman, charged with the duty of observing signals, under the rules and practice of the company, and transmitting them to the engineer (741, 743, 849, 1050, 1086). Before coming to this dwarf the engine had to cross Hertel avenue. This was four hundred and fifty-

seven feet from the dwarf, which, in turn, was eighty-seven feet from the track intersection. The fouling point, however, between the engines on the converging tracks was twenty-seven feet from the track intersection or sixty feet from the dwarf (410). The caboose was forty feet long and the engine projected forty feet ahead of the caboose (412), so that when the head of the caboose reached the fouling point, the cab of the engine was still twenty feet back of the dwarf. When Kinney reached Hertel avenue he saw the signal in the dwarf and it was green (341). *About this time his fireman looked out of the side of the engine, and also announced the light as green* (337). This was undisputed, although the fireman was in the employ of the defendant at the time of the trial and was in the court room (343-5).

Green was a safety or proceed signal.

Rule 18 of the defendant provided:

"After a signal has been prepared for an approaching train and it is found necessary to stop them or change the position of the switches or signals, or give another route, the signals must be set at danger, *but no switch changed or signals given to a train on a conflicting route until the train which first had the right of track has come to a full stop.*" (Fols. 362-364).

"Q. So that even if they took the light away from you they couldn't go any further in the movement until you had stopped?

A. Not according to the rule." (Fol. 364).

On this subject the defendant's towerman said:

"Q. If Mr. Kinney had been given the green light did you have any business to change the switches and give lights to the other trains on the other track?

A. No, sir.

Q. That would have been contrary to rules, wouldn't it?

A. Yes, sir.

Q. If Mr. Kinney had been given that green light so that he saw it, and his fireman saw it as they approached Hertel avenue, did you have a business to take it away from him?

A. No, sir.

Q. That is, if he saw that light he had a right to assume that he could proceed out on the main track, didn't he?

A. That was his indication.

Q. That told him just as plainly as words could tell it that the switches were set for him, and they are set against movements on the main track?

A. Yes, sir." (Fols. 1613-1615.)

Thereafter Kinney had the right to proceed without apprehending danger, as both the rule and practice told him that no conflicting movements could be made until he stopped.

It was also his claim that the brakeman on the head-end, charged with the duty of giving him the signal, continued to give him a come-ahead signal until the time of the accident.(353). From this point the plaintiff was unable to see the dwarf

signal because of leaking steam, coming from defects in the engine, (350) but was able to see the signals of the brakeman. (351). Just before the collision the signals of the brakeman became uncertain, which, under the rule, required Kinney to stop. (354). As he did so, a collision occurred with a passenger engine on the converging track, which tipped both engines over and caused the injuries complained of.

The engine which was furnished by the defendant to the plaintiff had been leaking steam for several days and was being operated in violation of the New York State Law governing the use and inspection of engines and boilers. (895-901). Temporary repairs had been made in it, but it was not fit for use and had been so reported to the round house superintendent. Nevertheless, the superintendent assured the plaintiff that the engine was in proper condition. (1116-17). While some leak of steam had developed, no trouble had occurred until the combination of the change of direction, the slight grade, the quartering wind and the low signal occurred. (350). That the plaintiff had a right to rely on the signal given by Mullen, the head-end orakeman, and that this signal as described by Kinney, and as given, from the position in which Mullen admitted he stood, was a proceed signal, appears from the testimony of engineers in the employ of the defendant. (See testimony of Dowd, Page 62; Dorgan, Page 361; Kinne, Page 343 and Peck, Page 236).

The defense was that at or about the time of the collision proceed signals were displayed on the main track, and that by reason of the tower being interlocking, it necessarily followed that Kinney could not also have had a proceed signal. It was also testified to by other members of Kinney's crew that *at some point beyond* where Kinney had seen the green light, the light was observed by these brakemen to be purple. The brakeman on the head-end also insisted that before the accident, and in time to stop, he had given Kinney a stop signal. The testimony of these brakemen has never been credited by the courts or juries before whom they appeared for reasons that will appear if the court cares to examine their evidence as set forth in this record.

A complete change in signals could be made in 17 seconds (1647) or three times while Kinney was proceeding from Hertel avenue to the dwarf. (1657).

The jury have found both the plaintiff and the defendant guilty of negligence as to the movement in question. If Kinney was mistaken about the light or if it in fact was changed the defendant had stationed a man on the end of the leading car in accordance with Rule 102 to tell Kinney about these things (Pages 98 and 99), as the caboose was ahead of Kinney. The jury could find that this brakeman failed in his duty. Of course, if the signals were set for Kinney all

the time then this brakeman was called on to give Kinney nothing more than the signals Kinney says he saw. If on the other hand the signals were set against Kinney and Kinney was negligently running by them into danger, the brakeman on whose signal the movement was necessarily conducted was required to give signals indicating the danger. His conduct on this subject was a proper matter for the jury and the verdict of the jury that he failed to give proper signals has ample evidence to support it.

If Kinney was negligent in not stopping because of the leaking steam, the defendant's negligence in creating the leaking steam was a concurring cause.

If Kinney was negligent in misreading the signal as "green", the defendant was negligent, through its fireman Sauer, in also misreading the same signal and miscalling it to Kinney.

If Kinney was negligent in failing to stop because of the uncertainty of Mullen's signals, the defendant was also negligent by reason of the uncertainty of those signals.

POINT I.

There is no new cause of action.

Respondent deems these propositions of law established by the following cases:

1st. That if interstate commerce appears upon the trial, the case must be determined by the Federal Law.

2nd. That the plaintiff can sue to recover for the wrong done, and the law to be administered, whether state or federal, is determined by the facts proved.

3rd. That a sufficient allegation to establish a cause of action in tort does not necessarily involve the mention of any statute.

4th. That where an action is duly commenced by the proper party within the time fixed by the Statute of Limitations, amendments which do not set up a new cause of action are within the discretion of the court and are not controlled by the Statute of Limitations.

5th. That a recovery may be had, where the facts proved warrant it, under the Federal Employers' Liability Act without an express allegation in the pleadings that the parties are engaged in interstate commerce, if such proof be made upon the trial and the defendant be not surprised thereby.

6th. That an amendment setting up the fact that the parties "at the times and in the manner "above set forth were then and there engaged in

"interstate commerce" does not set up a new cause of action.

The amendment to the complaint set up no new facts, except that it increased the damages. The new allegation was as follows:

> "And plaintiff further alleges, upon information and belief, that both the plaintiff and the defendant, *at the times and in the manner above set forth*, were then and there engaged in interstate commerce, and were subject to the provisions of an act of Congress known as the Federal Employers' Liability Act, which took effect in April, 1908." (Fol. 49).

As the N. Y. Court of Appeals said in the case of

Payne v. N. Y. S. & W. R. R. Co., 201 *N. Y.*, 440,

in determining that the facts might be plead in a single count, although liability might be claimed under the common law, the State Employers' Liability Statute and the Federal Statute, through Judge Werner:

> "The term 'cause of action' * * * In its simplest analysis * * * is synonymous with 'the right to bring a suit,' and that right is based upon the ground or grounds upon which an action may be maintained. * * * In such cases the different grounds of liability have sometimes been referred to as causes of action, 'when, in fact, there has been but a single cause of action' which could be established by evidence appropriate to each of

the grounds upon which the employers' liability is predicated either under the common law or under the statutes. There are other instances in which the statutes have created a new or extended liability not known at common law. In such cases it is quite accurate to say that the statute which establishes a new liability also creates a new 'cause of action,' for without the statute none would exist. In one case the right, the wrong, and the cause of action may all depend upon the language of the statute, and in another there may be separate and distinct grounds of liability under the common law, and under one or more statutes, which may be so pleaded as to entitle a plaintiff to recover under one or all. Thus, although there may be various grounds of liability, there can be but one cause of action and one recovery. The complaint before us fairly illustrates the difference between a case wholly dependent upon one or more provisions of specified statutes, and one where the defendant's liability may be predicated either upon the common law, the statutes or both. It sets forth facts which render the defendant liable at common law; it contains other allegations which tend to support a claim under the Employers' Liability Act which is pleaded; and it pleads still other averments which bring the case within the rule of the Federal statute. Suppose the plaintiff proves them all. Does that establish three distinct rights in the plaintiff, or three independent wrongs against the defendant, or support three separate recoveries? Obviously there is but one primary right, one primary wrong, and one liability. The single wrong has given rise to a single right, which may be established by as many different facts as the nature of the case may justify or demand."

No new liability is created by the Federal Act, which provides:

> "Every common carrier by railroad, while engaging in commerce between any of the several states or territories and any foreign nation shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury * * * resulting in whole or in part from the *negligence* of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its *negligence* in its cars, engines, appliances, etc." (Sec. 8651 U. S. Compiled Statutes).

As the court will see, this was a mere statement of common law liability as it existed in the State of New York from time immemorial. The only change in the law related to the defenses. *Negligence* on the part of the defendant as a proximate cause of the injury is the basis of liability—not a different negligence, but the same negligence. *The act which establishes the liability is the same; no matter under what law the cause of action is enforced.*

The amendment was wise, as some of the Federal courts had held that an affirmative allegation, invoking the Federal Law was necessary to completely state a cause of action and to prevent any claim of surprise on the part of the defendant when plaintiff undertook to establish interstate commerce.

The negligent act constituting liability was, however, exactly the same, and it is submitted that the Payne case establishes the rule in this state. That the state practice controls in matters of pleading and practice is decided by the United States Supreme Court in the case of

Lee v. Central Georgia Ry. Co., 40 S. C. R., 254 (252 U. S. 109), where Judge Brandeis, writing for the court says:

> "Whether two causes of action may be joined in a single count, or whether two persons may be sued in a single count are matters of pleading and practice relating solely to the form of the remedy. When they arise in state courts the final determination of such matters ordinarily rests with the state tribunals even if the rights therein being enforced are created by Federal law. (Citing cases) This has been specifically held in cases arising under the Federal Employers' Liability Act. (Citing cases) It is only when matters nominally of procedure are actually matters of substance which affect a federal right, that the decision of the state court therein becomes subject to review by this court. (citing cases)".

If no amendment had been made, and if it had appeared on any of the trials that at the time of the accident the parties were engaged in interstate commerce, then as the petitioner urges, the court would have been obliged to have submitted the case under that statute. Even so, without any reference to it in the pleadings, as this court said in the

Slavin case (236 U. S., 454),

"Neither the plaintiff's complaint nor the defendant's answer contained any reference to the Employers' Liability Act, but, over the plaintiff's objection, evidence was admitted which showed the train on which the plaintiff was riding at the time of the injury was engaged in interstate commerce. Thereupon, the railroad company insisted that the case was governed by the provisions of the Employers' Liability Act, and moved the court to direct a verdict in its favor. That motion having been overruled, the defendant asked the court to give in charge to the jury several applicable extracts from that Federal statute."

A verdict having been rendered in favor of the plaintiff, the case came to this court by writ of error. This court said:

"But a controlling Federal question was necessarily involved. For, when the plaintiff brought suit on the state statute, the defendant was entitled to disprove liability under the Ohio act, by showing that the injury had been inflicted while Slavin was employed in interstate business. And, if without amendment, the case proceeded with the proof showing that the right of the plaintiff and the liability of the defendant had to be measured by the Federal statute, it was error not to apply and enforce the provisions of that law."

That is what would have been done here had there been no amendment. The amendment merely deprived the defendant of any right to claim surprise.

In the case of

Seaboard Air Line Co. v. Koennecke, 239 U. S., 352 (36 S. C. T. 126),

in error from the Supreme Court of South Carolina to review a judgment which affirmed a judgment of the State Court in favor of the plaintiff, in an action for death, Judge Holmes, after pointing out that the declaration set forth negligence and dependency, and that the *testimony* brought out the fact that there was interstate commerce, and that the plaintiff asked leave to amend, said:

> "The declaration as it stood not disclosing in terms under which statute the action was brought * * * The amendment was allowed over a denial of the power of the court to allow it, which, however, is not argued here. (Citing cases) The defendant then objected to the trial going on. The court left it to the counsel to say whether he was taken by surprise, and, the counsel not being willing to say so, although saying that he was not prepared on the question of dependency, ordered the trial to proceed. * * * There is nothing to show that the trial court exceeded its discretionary power in allowing the trial to go on. * * * The court well may have considered that the defendant was endeavoring to get a technical advantage, as it had a right to, but that it would suffer no wrong. The cause of action arose under a different law by the amendment, but *the facts constituting the tort were the same, whichever law gave them that effect.*"

If, therefore, the Federal law would have been applied without the amendment, upon

proof of interstate commerce, it would seem idle to ask this court to say that the allowance of such an amendment, which was justified by the proof, and which was merely in support of the cause of action originally alleged, justifies this court in setting aside the verdict and granting a new trial.

As this court pointed out in the Lee case, these questions of pleading are matters of state practice. Nevertheless, under the liberal rules of the Federal practice, as found in Section 1591 of the United States Compiled Statutes, being Section 954 of the Revised Statutes,

> "No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules prescribe."

That the exercise of this discretion is not reviewable has been held so many times that I will

not burden this brief with citations, and that such amendment may be exercised at any stage of the case, even after trial and judgment, is well settled. The precise question here presented came up squarely in the Federal Courts for the first time, so far as I know, in the case of

Smith v. Atlantic Coastline R. Co., 210 Fed., 761 (Circuit Court of Appeals, Fourth Circuit.)

The injury occurred on December 4th, 1908. The action was commenced March 8th, 1910, and the original complaint did not refer to interstate commerce. In the amended complaint, filed June 15th, 1912, plaintiff added an allegation of interstate commerce. The defendant, by amended answer, pleaded the Statute of Limitations, and assigned the court's refusal to sustain this plea as error when the case reached the Circuit Court of Appeals, Judge Connor saying:

> "It will be convenient to dispose of the defendant's assignment of error first, as it is based upon a plea in bar and, if sustained, renders it unnecessary to consider plaintiff's writ of error. The learned judge, after taking into consideration defendant's motion, announced his conclusion, with his reasons therefor set out in the transcript. He was of the opinion that the amendment did not introduce a new cause of action; that the facts upon which plaintiff's cause of action were based were set out in the original complaint, the amendment simply alleging the interstate character of defendant's business and of the

train upon which he was employed when he sustained the injury. We do not deem it necessary to say more than that we concur in the reasoning and conclusion reached by the learned judge below. The original complaint stated a cause of action. The District Court had jurisdiction by reason of the diversity of citizenship. To this cause of action, as stated in the complaint defendant was entitled to interpose certain affirmative defenses When, by the amendment, the fact was developed that defendant was engaged in interstate commerce, and that the injury was sustained by plaintiff while employed on an interstate train of cars, defendant, by virtue of the federal statute, was deprived of these defenses. As said by Judge Smith: 'The statute does not deal with the cause of action, so far as negligence is concerned, at all, but with the defenses that may be allowed and the measure of the recovery.'

The exception to the refusal to grant defendant's motion for an instruction that plaintiff's cause of action was barred by the statute of limitation cannot be sustained."

I do not find that this case has ever been distinguished or overruled, although some state courts and one or two United States District Courts have reached a contrary conclusion.

OPINION IN THIS CASE.

The decisions of this Honorable Court were before the learned justice, now deceased, who permitted the amendment. As to them he said:

"In Missouri, Kansas & Texas Railroad

Co. v. Wulf, 226 U. S. (33 S. C. R. 135), it was held by the Supreme Court of the United states that the Federal Courts are presumed to be cognizant without pleading of the Federal Employers' Liability Act, and that it has the effect of superseding the state laws upon the subject. It was further held that the trial court, in the exercise of its authority, may allow an amendment for the purpose of bringing the action under the federal act, and that the allowance of such an amendment is not equivalent to the commencement of a new action *for the purpose of applying the two-year limitation prescribed by that statute.*

In the case of St. Louis, San Francisco & Texas R. R. v. Seale, 229 U. S., 156, 33 Sup. Ct. Rep. 651, the action was brought in the state court of Texas, not under the federal act, and without allegations contained in the complaint rendering applicable that act, but defendant proved at the trial facts which did render necessary the application of the act and requested the court to apply the act, which the court refused. The Supreme Court held that this was error.

In Seaboard Airline Ry. v. Koennecke, 239 U. S., 352 (36 S. C. R. 126), the action was brought in the State Court of South Carolina, not under the Federal Act. Application was made for an amendment for the purpose of bringing the case under the Federal Act, which was refused. The Supreme Court of the United States held that this was an abuse of discretion and amounted to a denial of due process of law guaranteed by the constitution.

In Wabash Ry. Co. v. Hayes, 234 U. S., 86 (34 S. C. R. 729), action was brought in the State Court of Illinois under the Employers' Liability Act. Allegations of the necessary

facts were made in the complaint but failed of proof at the trial wherefore, on the ground that the federal act was exclusive and of the failure of plaintiff to prove his cause of action under that statute, it was contended by the defendant that the complaint must be dismissed. But the Supreme Court of the United States held that this was not so. That after the failure to make proof of the necessary facts as to interstate commerce and employment requiring the application of the Federal Act plaintiff still had and was left to his common law right of action and could recover.

The effect of this decision is clearly that the federal act does not create a new or different cause of action, but simply abolishes the fellow servant rule and modifies the common law as to contributory negligence and in other matters. * * * *

In the case at bar the action was commenced concededly within two years after it occurred. Action was, therefore, brought on the basic cause of action for negligence, and the only cause of action that the plaintiff ever had. He had then, if he has now, the right to bring the action under the federal act, that is, if the facts as to interstate commerce and employment existed. He has not lost that right here for the reason that he did, in the terms of the federal act itself commence it 'within two years from the date the cause of action occurred.' "

Justice Bissell's opinion continues at length to discuss the subject and points out that no matter under what statute the suit is brought, the cause of action finds its origin in the common law duty

and obligation of the defendant to respond to the plaintiff for damages caused by its *negligence;* that all of the facts relating to the particular defenses of assumption of risk, the negligence of fellow servants and contributory negligence are set up in the original pleading and are not sought to be changed; that there is no departure from fact to fact; neither is there any departure from law to law, because the law must be applied to the facts as they develop upon the trial.

In the McAdow case (240 U. S. 51) the complaint neither alleged the law itself nor the facts requiring its application. The Supreme Court held, however, that the defendant might prove the facts requiring such application in order to show that the action did not come under it. "The law "governing the situation is equally the law of the "state, whether derived from Congress or the "State Legislature and must be noticed by the "courts."

In the Renn case, 241 U. S. 290, the court said: "We cannot say that the court erred in treating "the original complaint as pointing, although "only imperfectly, to a cause of action under the "law of Congress. And this being so, it must be "taken that the amendment merely expanded, or "amplified what was alleged in support of the "cause of action and related back to the com-"mencement of the suit, which was before the "limitation had expired."

We assume from these decisions that the plaintiff as well as the defendant could show from proof of the necessary facts at the trial that the Federal act applies, whether the law itself or the facts requiring its application, are pleaded or not; but it is the better practice for the plaintiff, if he intends to rely upon the statute, to plead the facts requiring its application, which plaintiff is here seeking to do by the amendment.

DISCUSSION OF THE LAW INCLUDING LATER CASES NOT BEFORE THE TRIAL COURT.

In denying various applications for writs of certiorari in which the question presented by the petitioner here has been formerly presented to this court, to which reference will be hereafter made, denials have always been based upon the *Wulf case*, 226 U. S., 570; 33 S. C. R., 135, and it is respectfully submitted that this case is still the law and is decisive of the claim of the petitioner.

In this case, as in the case at bar, there was no reference to interstate commerce. It is true that the petition alleged that the train upon which the deceased met his death was going from one state to another, but the action was brought, as was specifically alleged, under the State statute. The death occurred on November 27th, 1908. The action was brought by the widow in her individual

capacity, which was proper under the State statute but not proper under the Federal statute. In 1909 the defendant answered, without setting up interstate commerce, but in 1911—three years after the date of the death—the defendant amended its answer alleging interstate commerce. Thereupon the plaintiff amended the petition alleging that on January 4th, 1911 (more than two years after the date of the death), she had been duly appointed Administratrix of the Estate of the deceased, and for the first time set up interstate commerce. The acts of negligence relied upon were the same. Plaintiff got a verdict, which was affirmed by the Circuit Court of Appeals (192 Fed., 919). The case came to the United States Supreme Court on a writ of error. It was urged, as Judge Pitney pointed out in his opinion, that the argument for reversal rested wholly upon the fact that the first mention of the Federal Act, or the appearance in the action of the personal representative of the deceased was more than two years after the death, and that, therefore, the two years statute had run. In discussing this claim, Judge Pitney said:

> "It seems to us, however, that aside from the capacity in which the plaintiff assumed to bring her action, there is no substantial difference between the original and amended petitions. In the former, as in the latter, it was sufficiently averred that the deceased came to his death through injuries suffered while he was employed by the defendant railroad company in interstate commerce; that his death resulted from the negligence of the

company and by reason of defects in one of its locomotive engines, due to its negligence; and that since the deceased died unmarried and childless, the plaintiff, as his sole surviving parent, was the sole beneficiary of the action. It is true the original petition asserted a right of action under the laws of Kansas, without making reference to the act of Congress. But the court was presumed to be cognizant of the enactment of the employers' liability act, and to know that, with respect to the responsibility of interstate carriers by railroad to their employees injured in such commerce after its enactment, it had the effect of superseding state laws upon the subject. Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 53, 56 L. ed. 327, 347, 38 L. R. A. (N. S.) 44, 32 Sup. Ct. Rep. 169. Therefore the pleader was not required to refer to the Federal act, and the reference actually made to the Kansas statute no more vitiated the pleading than a reference to any other repealed statute would have done.

It is true that under the Federal statute the plaintiff could not, although sole beneficiary, maintain the action except as personal representative. So it was held in American R. Co. v. Birch, 224 U. S. 547, 56 L. ed. 879, 32 Sup. Ct. Rep. 603. But in that case there was no offer to amend by joining or substituting the personal representative, and this court, while reversing the judgment, did so without prejudice to such rights as the personal representatives might have. The decision left untouched the question of the propriety of such an amendment as was applied for and allowed in the case before us—an amendment that, without in any way modifying or enlarging the facts upon which the

action was based, in effect merely indicated the capacity in which the plaintiff was to prosecute the action. The amendment was clearly within Sec. 954 Rev. Stat. U. S. Comp. Stat., 1901, p. 696.

Nor do we think it was equivalent to the commencement of a new action, so as to render it subject to the two years' limitation prescribed by Sec. 6 of the employers' liability act. The change was in form rather than in substance. (Stewart v. Baltimore & O. R. Co., 168 U. S., 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105). It introduced no new or different cause of action, nor did it set up any different state of facts as the ground of action, and therefore it related back to the beginning of the suit." (Citing many cases).

The Court then discusses the distinction between the Wulf case and the Weiler case (158 U. S., 285), which is the authority relied upon by the petitioner here, and points out that in the Weiler case not only a different state of facts was set up by the petition, but a different rule of law invoked as the ground of the action.

The only distinction between the case at bar and the Wulf case is the fact that in the Wulf case the petition, while being expressly under the State statute, also contained an allegation that the train upon which the deceased was working went from one state to another. It would seem, from the reasoning of Judge Pitney, that this casual allegation was not the turning point in the case, but that the question that determined whether or not a new cause of action was set up was whether the

plaintiff still relied upon the same acts of negligence. This view is supported by the fact that in many subsequent cases where the question has been presented to this Court, and where writs of error and writs of certiorari have been denied, the element in the Wulf case which distinguishes it from the case at bar, viz, the casual allegation that the train was proceeding from one state to another, is lacking, and that, nevertheless, this court has applied the reasoning of the Wulf case, as will be later seen. In fact, in the Wulf case, the petitioner specifically and particularly relied upon the State statute, and by bringing the action in her personal capacity expressly elected to rely upon that statute to the exclusion of the Federal act, while in the case at bar, although the plaintiff served a notice authorizing him to rely upon the State statute, nevertheless, in his capacity to sue, and in the facts alleged he was in a position to recover under the Federal Act if it appeared upon the trial that the parties were engaged in interstate commerce; and unless it is the law that the plaintiff was obliged to mention the statute by name, or at his peril to plead every fact necessary to invoke that statute, then, as was pointed out in the Slavin case, *supra*, he could have recovered under the Federal act upon due proof of the facts requiring its application without any amendment. If that is the law, his position is certainly not weakened by the fact that an amendment was had. Under the practice of the State Court, he had a right to plead his facts in one count. He had a

right to recover under whatever law the facts proved applied to. The question as to whether or not the plaintiff was engaged in interstate commerce was a question of fact. The decision of that question was necessarily preliminary to the determination of the question of liability. Under the law and practice of his State, all he had to plead were the acts constituting the negligence of the defendant. Freedom from contributory negligence and assumption of risk were matters of defense, no matter under which law he recovered.

The New York State rule on this subject contains a simple test which meets this case exactly.

The Court of Appeals in the case of *Davis v. New York, Lake Erie & Western Railroad Co.*, 110 N. Y., 646, in a tort action where a suit was brought for injuries on account of a defective engine, and where after the trial and after the statute of limitations had run, the complaint was amended to show that the coal used was defective and improper, and an appeal was taken from the order granting the amendment, say:

> "These allegations did not constitute a new cause of action; the plaintiff still based his right to recover upon the same injury caused to him at the same time and place by the wrong of the defendant, and all that was added in the amended complaint were additional specifications of the same wrong. The plaintiff when he framed his original complaint may have been mistaken as to the cause of the effects from which he suffered

the injury, but he was not mistaken as to his cause of action.

"It is a fair test, to determine whether a new cause of action is alleged in the amended complaint, that a recovery had upon the original complaint would have been a bar to any recovery under the amended complaint."

Much is made by the petitioner of the fact that interstate commerce was not proved until the fourth trial of the action. This is not a sound legal objection, as the petitioner and this court know that the trial under review is the *last* trial, and if the plaintiff in the early stages of the litigation had not learned of the origin of the cars that he was moving, or properly apprehended the legal effect of that knowledge, it would indeed seem strange to ask the Supreme Court of the United States to penalize him on that account, if he was otherwise entitled to recover. Our position is that the amendment was unnecessary, but that it was properly granted, was within the sound discretion of the court, and set up no new cause of action. That this can be done after two years this court has repeatedly held in recent cases not before Justice Bissell at the time of the argument.

In the case of *St. Louis, San Francisco & Texas R. R. Co., Plaintiff in error v. Maud Smith, as Admx. of the Estate of M. T. Seal, dec'd.*, 37 S.C. R., 477; 243 U. S. 630, the judgment of the Court of Civil Appeals, for the Fifth Supreme Judicial

District of Texas, was affirmed. The court saying:

> "Per Curiam, judgment affirmed, with costs upon the authority of Mo. K. & T. R. Co. v. Wulf, 226 U. S., 570; 33 S. C. R., 135; Seaboard Airline R. Co. v. Koennecke, 239 U. S., 354; 36 S. C. R., 126; Seaboard Airline Co. v. Renn, 241 U. S. 290; 36 S. C. R., 567; see St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156; 33 S. C. R., 651."

The facts are found in
171 *So. Western Rep.*, 512 and
160 *So. Western Rep.*, 317.

It was a death case. The original action was started in 1909 in the name of the next of kin, to whom the Texas statutes give the cause of action. So far as appears from the reports, the complaint did not charge any violation of the Federal Act or mention the subject of interstate commerce. The defendant asked the plaintiff to elect whether she was proceeding under the Federal Act or the State Act. The court did not require the plaintiff to do this. The plaintiff went to trial and got a judgment under the State Act. This was affirmed by the highest court in Texas and the question was taken to the United States Supreme Court, reported in (229 U. S., 156), where the verdict in favor of the plaintiff was reversed on the ground that the facts showed the parties were engaged in interstate commerce. Then the defendant made a motion in the Texas courts to have the complaint dismissed. This motion went to the highest court

in Texas, where an opinion was written, found in (160 Western Rep., 317). The court refused to dismiss and said the plaintiff ought to have a chance to amend. Plaintiff then amended by substituting the personal representatives in the place of the next of kin and recovered under the Federal Act. This recovery went up to the highest State Court in Texas, reported in (171 South Western Rep., 512) where the specific point was presented that the Federal Act had not been pleaded, and that more than two years had elapsed, and it was this decision in favor of the plaintiff which was affirmed in the United States Supreme Court, *supra.*

It would seem that if the plaintiff can amend after two years by putting in a personal representative, and pleading the Federal Act, that he certainly can amend where all he has to do is to plead the Federal Act.

In discussing this case the petitioner does not meet the question. The amended petition he refers to within the two years did not set up interstate commerce, as we read the reports, and this court set aside the verdict rendered under the State Law because interstate commerce actually appeared upon the trial and no recovery was sought under the Federal Act, and no representative appointed and no interstate act plead until two years had elapsed, and it is to be noted that the right of the plaintiff to recover was placed by this

court upon the Wulf case, thus demonstrating that the casual allegation that the plaintiff was proceeding from one state to another contained in the petition in the Wulf case was not the ground upon which the ruling was made.

The same question again came before the court in the case of

Illinois Central R. R. Co. v. Lannis, 38 S. C. R., 334 (246 U. S., 652),

where a writ of error had been granted upon the application of the defendant, bringing up for review a decision of the Supreme Court of the State of Louisiana, reported in (140 Louisiana, Page 1; 72 Southern, Page 78), where the facts were as follows:

The deceased was employed by the Railroad Company in pumping oil into the tender of a locomotive. He was injured through an explosion brought about by the negligence of a fellow servant. An action was commenced in the name of the widow under the law of the state. It was subsequently determined in another action for the death of another employee that the work was interstate. The widow was allowed to qualify as Administratrix and amend her complaint more than two years after the event. Defendant plead the Statute of Limitations. The Administratrix secured a verdict. Both parties admitted that the cause was controlled by the Federal Act, the Supreme Court of Louisiana holding that if the orig

inal action were brought in time, the amendment was proper. In dismissing the writ of error the United States Supreme Court said:

> "Per Curiam. Judgment affirmed with costs upon the authority of Missouri, Kansas & Texas Ry. Co. v. Wulf, 226 U. S., 570, 576; 33 Sup. Ct. 135; 57 L. Ed. 355; Ann. Cas. 1914 B. 134; Illinois Surety Co. v. United States, 240 U. S., 214, 221; 36 Sup. Ct. 321; 60 L. Ed. 609; Seaboard Air Line Ry. v. Renn, 241 U. S. 290, 293-294; 36 Sup. Ct. 567; 60 L. Ed. 1006."

There is nothing in the petitioner's argument which distinguishes this case from the case at bar.

Again the question came before the United States Supreme Court in the case of

> *Baltimore & Ohio R. Co. v. Smith,* (reported in 38 S. C. R., 335; 246 U. S., 653).

This was another writ of error to the Court of Appeals of the State of Kentucky, reported in (169 Kentucky, 593; 184 So. Western Reporter, 1108).

In this case the accident complained of occurred in 1909. Within two years an action was brought, which did not set up interstate commerce or mention the Federal Act. After the two years had expired the plaintiff filed an amended complaint, asking for increased damages, and to this the defendant answered, pleading the Federal Act and that the cause of action was barred by the Statute

of Limitations. Nevertheless, the court held that the action would lie and that a recovery could be sustained under the Federal Act.

The court relies on the Wulf case (226 U. S., 570) and the Seal case (229 U. S., 156) and says:

> "On the authority of these cases we think it is clear that when a cause of action arises under the Federal Statute, but suit is brought under the State Law, or by some person not authorized to maintain an action under the Federal Statute, defects in the original petition may be cured by an amendment that does not set up a new and distinct cause of action filed after the expiration of two years from the accrual of the cause of action, as the amendment will relate back to the filing of the original petition."

This position the United States Supreme Court sustained, saying:

> "Per Curiam. Judgment affirmed with costs upon the authority of: 1. Missouri, Kansas & Texas Ry. Co. v. Wulf, 226 U. S., 570, 576, 33 Sup. Ct. 135, 57 L. Ed. 355; Ann. Cas. 1914 B, 134; Illinois Surety Co. v. United States, 240 U. S., 214, 221; 36 Sup. Ct. 321, 60; L. Ed. 609; Seaboard Air Line Ry. v. Benn, 241 U. S. 290, 293-294, 36 Sup. Ct. 567; 60 L. Ed. 1006. 2. Chicago Junction Ry. Co. v. King, 222 U. S. 222, 32 Sup. Ct. 79, 56 L. Ed. 173; Seaboard Air Line Ry. Co. v. Padgett, 236 U. S., 668, 673, 35 Sup. Ct. 481, 59 L. Ed. 777; Seaboard Air Line Ry. v. Koennecke, 239 U. S., 352, 355, 36 Sup. Ct. 126, 60 L. Ed. 324; Great Northern Ry. Co. v. Knapp, 240 U. S., 464, 466, 36 Sup. Ct. 399, 60 L. Ed. 745; B. & O. R. R. Co. v. Whiteacre, 242 U. S., 169, 37 Sup. Ct. 33, 61 L. Ed. 228."

In this case, as in the Wulf case, the original petition, filed within two years, contained the casual allegation that the train which the plaintiff was operating ran through different states, but the action was brought under the State Act and by the person there authorized to bring it, and the writ of certiorari is denied in the United States Supreme Court on the authority of the Koennecke case, where there was no such casual allegation.

Again the question came up in the case of *Curtice v. Chicago & No. Western Ry. Co.* in the Supreme Court of Wisconsin, reported in (156 North Western Reporter, at page 484; 162 Wisconsin, 421).

An action was brought against a railroad under the state law. More than two years after the injury to the plaintiff he was permitted to amend his complaint to allege facts showing that the plaintiff and defendant were engaged in interstate commerce.

From opinion by Kirwin, *J.*:

"The point involved upon this appeal, under the assignments of error, is whether the amended complaint set up a different cause of action than that stated in the original complaint. The contention of the appellant is that there is but one cause of action, and that under the federal act, while on the part of the respondent it is insisted that the original complaint set up a cause of action under the

state law, and that the amendment changed it from a cause of action under the state law to one under the federal act.

(1) It is obvious that but one cause of action existed upon all the facts stated in the amended complaint. It is equally obvious that the original complaint was defective in failing to state certain facts going to show that at the time the injury was sustained the parties were engaged in interstate commerce. Nothing stated in the amended complaint was in conflict or inconsistent with the allegations of the original complaint. The cause of action upon which the plaintiff sought to recover damages was defectively stated in the original complaint, and the defects were cured by the amendment. But one cause of action was stated. The amendment related back to the original complaint and became a part of it; hence the statute of limitations was no defense." (Citing the cases heretofore cited).

An application for a re-hearing was made in this case on the strength of the Renn case (241 U. S., 290), and again the Supreme Court of Wisconsin considered the question (reported in 166 Wisconsin, 594; 166 North Western Reporter, 444).

The court reiterated this view that the amendment allowed did not set up a new cause of action, but merely perfected a statement of the only right of action the plaintiff had under the facts originally pleaded. It added, however, this observation:

"The case of Seaboard Air Line Ry. v. Renn, 241, U. S., 290 (the case annotated), seems by implication, though not by express

decision, to hold a different doctrine from this, and were the question presented to us as an original question on this appeal, there would be a strong argument in favor of the proposition that we ought now to follow the intimation of the Federal Supreme Court. For myself I very much doubt whether that court will itself follow the intimation when the question is squarely presented for decision."

It will thus be seen that the exact question presented here was presented there. Application for a writ of certiorari was made to the United States Supreme Court *and denied*, the court making a special reference to the opinion below, reported in (38 S. C. R., 578, 247 U. S., 510).

The defendant urges that this case can be distinguished from the case at bar by the fact that the North Western Railway Company plead interstate commerce as an answer to the original complaint. This has no force, because the plaintiff did not elect to proceed upon these pleadings, but as is specifically shown in the opinion (162 Wisconsin, 421), the plaintiff thereafter amended and proceeded to trial upon his amended petition and not upon the original petition and answer, and it was the question of his right to so amend after the two years statute had expired that was before the Supreme Court of Wisconsin and this court. It would seem that where the plaintiff got the information about interstate commerce cannot be a determining factor in the settlement of

this question, whether he got it from the defendant's answer, or the proof upon the trial, or subsequently acquired information, as in the case at bar. *The point is that a recovery can be had under the Federal statute without an allegation of interstate commerce in the complaint within two years, where the action has been duly commenced and interstate commerce appears upon the trial, and no different elements of negligence are sought to be established by the plaintiff.*

In support of this contention we also cite Texas & Pacific Railway Company vs. Cox, 145 U. S. 593, 12 S. C. R. 905-908.

The same conclusion has been reached in the highest courts of various states where the question has been up:

Vickery v. New London R. Co., 87 Conn., 634; 89 Atlantic, 277.

"The worst that can be said of the complaint from the defendant's standpoint is that it contains no allegations showing that it was brought under the Federal Statute; that subject. * * * A plaintiff may not, of course, avail himself of the allegations of an answer to introduce or prosecute a new cause of action against which a statutory limitation has run, but he may do so to help out a defective statement of his cause of action. That is the situation in this case. The defendant's allegations accomplished the same curative result that was attempted to be accomplished by the proposed amendment. It matters not that these allegations came

into the pleadings more than two years after the plaintiff's injuries were sustained. The effect of them was not to give to the plaintiff a new cause of action, but to help out the original cause of action upon which action had been brought within the statutory period."

In

Gainsville Midland Ry. v. Van Dever, 141 Georgia, 350 (80 So. Eastern 997), the Supreme Court of Georgia allowed an amendment in an action by an individual, alleging the Federal Act, more than two years after the injury.

The Supreme Court of Michigan, in

Jorksen v. Grand Rapids & I. R. Co., 189 Mich., 537 (155 North Western, 535), held that an amendment to an action originally brought under the State Employers' Liability Act, which set up the Federal Act more than two years after the action accrued, did not introduce a new cause of action and was proper.

The Court of Civil Appeals of Texas in

Bird v. Fort Worth & R. G. Ry. Co. 207 South Western, 518,

also reported in (196 South Western, 597), held that there was no such departure between the allegations of the original petition and the amended petition with respect to the negligence relied

on for recovery as would prevent the amendment from relating back to the filing of the original petition.

The same conclusion was reached by the Supreme Court of Tennessee in

Nashville C. & S. T. L. Ry. v. Anderson, 134 Tenn., 666 (185 S. W., 677),

and by the Supreme Court of Nebraska in

Ziknik v. Union Pacific R. Co., 95 Nebraska, 152 (145 North Western, 344).

In this case a writ of error was sued out by the defendant to the United States Supreme Court, which was subsequently dismissed on the defendant's motion (239 U. S., 650; 36 S. C. R., 159).

In the case of

Broom v. Southern Ry. in Mississippi, 76 So. Rep., 725,

the Supreme Court of the State of Mississippi has passed upon our question.

On June 19th, 1915, the plaintiff brought an action against the defendant for the death of her intestate. The petition alleged that the defendant was an *intrastate* railroad and asked for damages under the State Law. The death occurred in June, 1913. In September, 1915, the Railway Company gave notice that the deceased was engaged in interstate commerce. Following this

and in September, 1915, the declaration was amended to set up interstate commerce. Both the notice and the amendment were after the two years had elapsed. The defendant urged that the statute had run, and this question came before the Supreme Court, which said:

> "It will be observed here that the only amendment made to the original declaration was the allegation that the injury occurred while the parties were engaged in interstate commerce, instead of intrastate commerce. This amendment did not present a new or different statement of facts upon which the action was based, but merely amended the declaration, so as to come within the operation of the Federal Employers' Liability Act, instead of the state law. The allegations contained in the original declaration did not support a cause of action under the federal law, but the amendment is not inconsistent with the purpose and relief originally sought by the declaration. It appears, therefore, that the amendment did not constitute a new cause of action, inconsistent with that set forth in the original declaration. The amendment was properly allowed by the lower court. It was not the beginning of a new action; but the suit should be treated as having been commenced at the time of the filing of the original declaration, which was done within the two years allowed in such cases. The demurrer to the plea of statute of limitation filed by the appellee in the lower court should have been sustained and for this error the judgment of the lower court is reversed and the case remanded. Curtice v. Railway Co., 162 Wis. 421, 156 N. W. 484, 1916 D., p. 316; M. K. & T. Ry. Co. v. Wulf, 226 U. S., 570, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914 B, 134."

It is true that some state courts, cited by the defendant, and others not cited, have reached a contrary conclusion, but as the precise point has now been before the United States Supreme Court so many times with the same result, it is respectfully urged that the position heretofore taken on this subject should not now be departed from.

The Hughes case is not an authority, as the court will see on examining the opinion. In that case the accident happened in Pennsylvania. The plaintiff survived the accident and brought an action under the State Law. He died, and his widow some three years after the accident, sought to bring an action under the Federal Act, which was held barred by the statute.

In conclusion, the amendment sought did not introduce a new cause of action. The complaint was exactly the same, with the exception of the prayer for increased damages. The only thing added was a reference to the Federal Act. Interstate Commerce being once established, this was the only cause of action the plaintiff had, and such cause of action arose from the facts pleaded, there being no modification in the allegations of negligence.

The practice of the Courts of the State of New York has been uniform on this subject. The only test applied to an amendment even after the statute is run is its inconsistency.

See:

Gropp v. Gt. Atlantic & Pacific Tea Co., 161 A. D., 859.

The added allegation in the complaint at bar related to the same negligence previously pleaded and was not inconsistent therewith.

In its elaborate examination of the cases the defendant has failed to point out a single case in Federal Court in conflict with the case of

Smith v. Atlantic Coastline R. Co., 210 Fed., 761. *(Supra)*

DISCUSSING CASES RELIED ON BY PETITIONERS.

In *Troxwell v. D. L. & W. R. R. Co.*, 227 U. S. 434; 33 S. C. R., 274.

Suit was commenced by a widow and surviving children of deceased individually under a statute of Pennsylvania. The case was tried out and plaintiff failed. A second action was brought under the Federal Act, but within the two years, so no Statute of Limitations was involved. It was urged by defendant that the judgment in the first action was a bar to the second. The Supreme Court disagreed with this on three grounds:

First: That the remedy first taken was a mistaken one, which did not prevent plaintiff from pursuing the second and proper remedy.

Second: That the issues involved in the second action were not adjudicated at all in the first, and, therefore, the judgment in the first was not a bar.

Third: The parties were not the same, the widow and children suing individually in the first action and the administratrix in the second.

Gulf, Colorado & Ry. Co. v. McGinnis,
228 U. S., 173; 33 S. C. R., 426.

No question involved in the case at bar was presented in the above cited case.

Hogarty v. Philadelphia & R. Ry. Co.,
225 Pa., 236.

The Pennsylvania court holds that after an action has been brought as a common law action in the state court and has failed, after proceeding to judgment, that plaintiff is not entitled to have the case remanded for the purpose of amending.

The misapplication of the case last above cited is illustrated by the evident misapplication of

Walker v. Iowa Cent. R. R. Co., 241 Fed., 395.

In that case the petition, it was held, did not state a cause of action under the Federal Act. After the determination of the action, plaintiff sought to amend. The court said:

"If, however, the amended petition under consideration had been presented during the

pendency of the action in the Circuit Court and before its determination in that court, it might very properly have been permitted to stand, and, if sustained by sufficient proof, would, undoubtedly, have supported a judgment under the Act of Congress."

In *Allen v. Tuscarora Valley R. R.*, 229 Pa., 97, the action is brought at common law to recover for injuries to plaintiff in the State Court of Pennsylvania. Four years afterwards, and after any action under the Federal Safety Appliance Act was outlawed, the complaint was sought to be amended and the cause of action changed to one under the Safety Appliance Act. This case is not applicable because there was some reason for saying that the Safety Appliance Act does create a cause of action different from common law cause of action for injuries on the ground of negligence.

Insofar as the Pennsylvania cases above cited affect the question under the Federal Employers' Liability Act, they are not only directly contrary to the Payne case and others in our state on the subject, but also against the decision of the Supreme Court of the United States.

In *Hall v. Louisville & N. R. Co.*, 157 Fed., 464, an action was brought by the widow of deceased individually under the Florida statute. It was held that the complaint could not be amended by substituting the administratrix and thus bringing the case under the Federal Act. That case was

overruled by the Supreme Court of the United States in the Wulf case (226 U. S., 570) where it was held that that very thing could be done.

In *Fort Worth & R. G. Ry. Co. v. Bird*, 196 S. W., 597, the action was originally brought in a state court under the Texas statute giving the cause of action. It was held that plaintiff could not depart from such cause of action and resort to the Federal Act after two years.

The same was held in *Findlay v. Coal & Coke Ry. Co.*, 87 *S. E.* 198, and both these decisions are overruled by the Seal case, 243 U. S. 630, 171 S. W. 512, 160 S. W. 317, *supra*.

The case of *Hughes v. N. Y. O. & W. R. R. Co.*, 158 A. D., 443, was overruled by the Supreme Court of the United States in the Wulf case (220 U. S., 570).

The Kinney case (opinion by Justice Wheeler, set out at length at Page 47 of the brief) was one of the phases of this particular action, and Justice Wheeler was unanimously reversed by the Appellate Division (185 A. D. 903).

In the case of *Walker v. Iowa Central Ry.*, 241 Fed., 395, is a District Court decision, and apparently relates more particularly to questions of practice in Iowa.

It is, therefore respectfully submitted:

1st: That neither the Weiler case nor the Renn case is authority for the petitioner's claim.

2d: That this court has expressly overruled his claim in the *Wulf* case, the *Seale* case, the *Slavin* case, the *Koennecke* case, the *Hayes* case, the *McAdow* case, the *Smith* case, the *Lanis* case, and the case of *Smith v. B. & O.* and the *Curtice* case.

3rd: That every state court of last resort before whom the question has come, except the State of Pennsylvania, has decided adversely to the petitioner's contention.

4th: That the practice adopted in this case by the courts of the State of New York is in accordance with its rules of practice adopted from time immemorial.

5th: That the right of the plaintiff to recover is clear without considering any question of amendment, and finally, that the allowance or disallowance of the amendment is a matter of discretion under Section 934 of the Revised Statutes.

It only remains to answer what the petitioner evidently regards as his culminating argument, found on Page 31 of his brief. He says, assume that by final judgment the plaintiff had been defeated in his action under the State Act, could he then bring a new action under the Federal Act?

In this case the plaintiff has not been defeated under the State Act. His law suit is just as much alive as if it had never been tried. There was, it is true, a question of fact as to whether the plaintiff was engaged in interstate commerce. The determination of that question of fact determined the law to be applied. *If the plaintiff had done nothing but serve a summons, and had filed no pleading until after the two years had expired, could the defendant be heard to complain that the cause of action was outlawed because interstate commerce had not been plead within two years?*

The original action was brought for Twenty-five Thousand Dollars. The amendment, made more than two years afterwards, increased the amount prayed for to Fifty Thousand Dollars. The net verdict is for Thirty-two Thousand Dollars.

Every argument that the petitioner has made to support the claim that a new cause of action has been set up would apply to the prayer for additional relief, and tend to establish the absurd proposition that while a verdict for Twenty-five Thousand Dollars might be proper, any increased sum sought for after two years had expired was outlawed.

The original complaint, which is before the court, set forth every act of negligence for which a recovery was had. The amendment merely am-

plied and gave greater precision to it. As Judge Van Devanter said, when sitting in the Eighth Circuit, in the case of *Crotty v. Chicago Great Western Ry. Co.*, 189 Fed., 593, where the question of the running of the Statute of Limitations was raised because an additional allegation of negligence had been set out in a complaint, where a trial had been had and plaintiff had failed.

> "The excerpts from the petition and the amendment hereinbefore set forth make it plain that such negligence was intended to be, and was substantially, charged in the petition, and that the amendment, instead of presenting a new charge, merely amplified and gave greater precision to one already presented. And, this being so, the case was well within the rule that an amendment to a petition which sets up no new cause of action, demand, or charge, but merely amplifies and gives greater precision to the allegations in support of the cause of action, demand or charge originally presented, relates back to the commencement of the action, and the running of the statute of limitations against the cause of action, demand or charge so pleaded is arrested at that point. Whalen v. Gordon, 27 C. C. A. 70, 82 Fed. 305; Pettibone v. Allen-West Commission Co., 65 C. C. A. 509, 132 Fed. 699; Hutchinson v. Otis, 190 U. S., 552, 555, 23 Sup. Ct. 776, 47 L. Ed. 1179; Thayer v. Coal Co., 129 Iowa, 550, 105 N. W., 1028 Gordon v. Railway Co., 129 Iowa, 167, 105 N. W., 427."

This is not a case where the plaintiff has been silent and let his rights lapse. On the contrary, he has been asserting them in every way he knew

how for thirteen years. As Judge Buffington said in the case of *Klumpp v. Thomas*, 162 Fed., Rep. 853 (writ denied by the United States Supreme Court, 29 S. C. R., 688):

> "Statutes of limitation are statutes of repose, and are based on the likelihood that inaction for a protracted period would not occur unless a settlement had been made. But where litigation is going on, where the parties are using legal proceedings to effect a settlement, it would be at variance with the principles underlying limitations to hold that such statutes were then running."

POINT II.

The verdict of the jury that the parties were engaged in interstate commerce at the time of the accident was supported by the evidence.

The unanimous decision of the Appellate Division in the Fourth Department precluded the defendant from reviewing this question in the Court of Appeals under the New York State practice and statutes.

Sec. 191, Subdivision 3, Code of Civil Procedure.

Article 6, Sec. 9, New York State Constitution.

The jury on the trial which preceded the trial under review had so found. (Page 7 of petition).

Ample evidence to support the finding was given by witnesses, most of whom were in the employ of the defendant. The plaintiff was taking cars from a yard close to the International Bridge over the Niagara river, and the cars were coming from certain tracks on which the plaintiff's witnesses swore nothing but cars from the Canadian side were placed. Kinney was turning around for the purpose of taking a train from these tracks.

(See testimony of plaintiff, Page 88; testimony of defendant's conductor, Page 597 to 603).

The principal evidence on the subject was given by the defendant's yardmaster, whom the plaintiff had subpoenaed and forced to disclose the facts (Pages 50 to 55). Other testimony was given by former employees of the defendant (Pages 66 and 67; 74, 89). The defendant, although required to do so, failed to produce the car records and claimed that some other freight sometimes got on these tracks and that they were not exclusively reserved for Canadian cars. Whether they were was for the jury, there being evidence to support the claim. If they were, then the plaintiff and defendant were engaged in interstate commerce.

Seaboard Airline Co. v. Koennecke, 239 U. S., 352; 36 S. C. R., 126.

Carr v. N. Y. C. R. Co., 238 U. S., 260; 35 S. C. R., 780.

Pennsylvania R. Co. v. Donat, 239 U. S., 50; 36 S. C. R., 4.

The plaintiff proved the general order of business, and the burden of proving an exception to that general order of business rested on the defendant.

Erie R. Co. v. Kryzanski, 238 Fed., 143.

POINT III.

There was no error in respect to the request complained of. It was withdrawn and not charged.

On the trial, at the request of the Trial Justice, both sides presented requests in writing, and as these requests had to be submitted in advance of the charge, many of them were unnecessary. After the charge, the court went through the requests, and when he came to the particular request complained of, which was a part of a series of requests on the subject of assumed risk, intended to be taken in connection with the other requests, the request was withdrawn. The court then stated that he had charged it in his main charge (3246), and Mr. Ward said:

> "I withdraw that request, and I don't ask your Honor to pass on it. That one you have just read I withdraw."

The court had already consented to the withdrawal of the request, which would amount to a withdrawal of the main charge on the subject.

The court will see upon examining the record that the defendant used the same language in withdrawing many requests (Fols. 3333-47). Under the State law, under which the case would come if the jury found that the parties were not engaged in interstate commerce, the question of assumed risk is regulated by statute.

Fitzwater v. Warren, 206 N. Y., 355.

N. Y. State Employers' Liability Act, Sec. 202 Labor Law, and whether or not any risk is assumed is a question of fact.

This is not the ordinary rule in actions under the Federal Employers' Liability Act, but even there it sometimes is a question of fact whether the ordinary risks of the business are assumed. Among these exceptions are situations where a promise of repair or a specific assurance of safety has been given. That was the situation in this case. The plaintiff had been told that the engine was all right and that he should take it out (1116-1117) and no trouble had developed in the obstruction of his view from the escape of steam before the moment of the accident (350-351). This, of course, affects the risks to be assumed, both under the State and Federal practice.

New Aetna Portland Cement Co. v. Hatt, 231 Fed., 611.

Rice v. Eureka Paper Co., 174 N. Y., 385.

Seaboard Airline Co. v. Horton, 239 U. S., 595; 36 S. C. R., 180.

Schmidt vs. South Western B. & O. Co.,
226 U. S. 162, 33 S. C. R. 68.

The question of assumed risk, relates to the escaping steam, as I assume that the defendant does not argue here that the plaintiff assumed the risk of the unexpected negligence of co-employees.

The negligence involved in escaping steam was statutory (895-901), but the whole case turned, as the judge charged repeatedly, and particularly in response to the defendant's requests, on the condition of the light, the defendant's negligence on that subject being made the *sine quanon* of recovery (3218) (3252-3), so that the jury never got to the question of escaping steam until they found that the defendant was negligent in the manner in which it displayed its signals (3252). However, although the plaintiff may have been entitled to the withdrawn request under the Federal as well as the State law, the request was withdrawn, and the charge was made, modified and corrected exactly in accordance with the present contentions of the defendant, for the court later charged:

> "That if the plaintiff had notice on his first trip to Tonawanda that the escape of steam from the engine would interfere with his taking dwarf signals, and he did not exercise his privilege of sidetracking his engine, or securing another engine on his return to East Buffalo, but started on his trip to Black Rock, that he assumed the risk of the continued leaking of steam at the time of the accident."
>
> "That I will find as requested with this

modification, that if Kinney knew of the defects in the engine when he started or discovered them while enroute on his trip, he cannot be charged with assumption of risk unless he knew and appreciated the particular danger arising therefrom in the obstruction of his vision in preventing him from seeing the dwarf signal at the critical moment of the accident, or as he approached the dwarf or unless such danger was so obvious that a person of ordinary prudence must be presumed to have known and appreciated it, and in that behalf any evidence that the escaping steam previous to the time that he was approaching the dwarf did not obscure his vision or prevent him from seeing the signals, should be considered by the jury."

"Mr. Spratt: If the court please, on reconsideration I would like to have you read twenty-two and twenty-three.

The Court. I have granted them both. Twenty-two, 'That if when Kinney started to proceed with his engine from Tower "I" to Tower 55 against the current of traffic, he was aware of the fact that the steam from the engine was enveloping and would so envelop the engine that it would interfere with his seeing either the dwarf signal, or Mullen's signals, or both, and he continued on with the steam enveloping his engine and interfering with his view of the signals, that he assumed the risk of any injury resulting because of the steam escaping from the engine.' I have granted that." (Fol. 3341-2).

At Folio 3300, and again at Folio 3303, and again at Folio 3304, and again at Folio 3307, charging from the language of the United States Supreme Court decisions therein referred to, the

Trial Justice charged the rule of assumed risk which defendant now claims was violated, all subsequent to the withdrawn request.

And in his main charge, at Folio 3246, the court said:

> "It is a rule of law that when a person is engaged in the service of another, he undertakes as between himself and his employer to run all the necessary and ordinary risks incident to such service, and takes his chances as to all open and obvious risks known to him and incident to his employment, and cannot recover if the accident was the result of one of such risks."

That a request may be withdrawn, and that a party may disclaim the benefit of an erroneous statement of law made by the court has been held by this court in the case of

Klump v. N. Y. C. R. Co., 179 A. D., 279; 226 N. Y., 666.

That an erroneous charge may be later corrected needs no citation of authority, and if the defendant complains that the correction was not made more definite at the moment, this was his fault, as the court has pointed out in the case of

Clark v. N. Y. C. R. Co., 191 N. Y., 416.

In its effort to keep the Kinney case alive, the defendant has erected a straw man, which it proceeds to demolish under this point.

The question of escaping steam was not the main question in the case, but was merely an additional ground of negligence, and before the jury reached its consideration, other negligence, viz, the display of the false light, had to be found. It was a sudden and unexpected risk. I do not assume that the defendant here seriously maintains that it operates its road in constant violation of the State and Federal law on the subject, and that an engine leaking steam so as to obstruct vision is an ordinary thing. If it were a sudden and unexpected risk, the law governing its assumption has been laid down by this court in the case of

Chesapeake & O. R. Co. v. Proffit 241 U. S., 462; 36 S. C. R. 620,

and

Chesapeake & O. R. Co. v. DeAtley, 241 U. S., 310; 36 S. C. R., 564.

The defendant's argument under this point hopelessly confuses the question of assumed risk with the question of contributory negligence. He says:

> "One of the risks inherent in Kinney's employment was that a proper engine might commence to leak steam while on a trip." (Page 78).

This was certainly a question of fact.

Again he says:

> "He certainly assumed the risk of continu-

ing to use the steamy engine under the conditions testified to by him upon the trial." (Page 78).

This also must have been a question of fact.

Again he said:

"If Mullen gave the stop signal, but Kinney failed to properly read it because of the escaping steam then we assert that this was one of the risks incident to his employment, which he assumed as a matter of law. Certainly if the steamy condition of this engine developed after Kinney took it out, he assumed as a matter of law, the risk of any injury resulting from its continued use." (Petition p. 80).

This also must be a question of fact. As Judge Clark said in the latest case on assumed risk,

So. Pac. R. Co. v. Berkshire, (decided January 3d, 1921, and reported in 41 S. C. R., 162), quoting from the case of (Railway Company v. Hall, 232 U. S., 94-104; 34 S. C. R., 229, 231):

"In order to charge an employe with the assumption of a risk attributable to a defect due to the employer's negligence, it must appear not only that he knew (or is presumed to have known) of the defect, *but that he knew that it endangered his safety,* or else such danger must have been so obvious, that an ordinary prudent person, under the circumstances, would have appreciated it." (Italics ours).

The doctrine of assumed risk is hardly applicable to this case. It is not claimed that Kinney's

view of the signals of the fellow servant were obstructed by the steam (350-351). He, therefore, had other means of governing his course than those which the escaping steam interfered with. *It was only when the servant, whose duty it was to see what Kinney could not see, also failed that the obstruction to Kinney's view of the dwarf became important. The signal man was placed ahead on the leading car for the particular purpose of protecting Kinney, whose view was necessarily obstructed by the car itself.* This negligence of the signal-man the jury has found, and it would seem that it was only in combination with this negligence that the escape of steam became harmful, and that Kinney cannot be charged —certainly not as a matter of law—with assuming a risk or danger, one necessary and essential element of which is the unexpected negligence of a fellow servant.

See

Chicago, R. I. & P. R. Co. v. Ward, 252 U. S., 18; 40 S. C. R., 275.

POINT IV.

There was no error under the charge complained of in defendant's Point IV.

The law on the subject is quite fully discussed in the preceding point.

The charge as made was a perfectly correct statement of the law, as your Honors will see from reading the case of

Great Northern Ry. Co. v. Donaldson, 246 U. S., 121 (38 S. C. R. 230).

The courts have always said that it was not unexpected, unusual or extraordinary risks that were assumed.

Again we point out that after Kinney saw the green light, there were no risks to be assumed unless the defendant violated its own rule and changed the switches before Kinney stopped. Kinney's cause of action rests on this. Judge Bissell told the jury that unless Kinney saw the light green when he was at Hertel Avenue, he could not recover. (3216-18; 3252).

It is, therefore, the law in this case that the jury so found. Knowing this, Kinney also knew that he had a right to go out on the main track, and was protected in so doing unless the defendant violated its own rules. It would seem idle to argue that he was charged with assuming any such risk.

The defendant's argument in his third and subsequent points all partake of the same error. It is asking the court to charge that Kinney assumed the risk of certain general conditions. These conditions are not simple conditions, but complex conditions. It was an extraordinary accident

which there were three essential elements: (a), the defective or imperfectly displayed signal; (b), the negligence of the signal-man on the head car; (c), the escaping steam.

No danger from the latter existed without the mistaken light and the negligent signal-man. To tell the jury that Kinney assumed *all* the danger in which the escaping steam was involved necessarily required a ruling that he assumed the danger of the defendant's other negligence without the existence of which the escaping steam would have been harmless. Even if he had known of the escaping steam, he certainly had a right to assume that the signal once displayed to him, which justified him in proceeding, would not be changed, and that the signal-man who was ahead of the steam, and whose signals could be seen by Kinney, would give him a correct signal.

We have no quarrel with the authorities cited by the defendant under this point.

POINT V.

There was no error in the charge of the court under this point, for the reasons before stated.

POINT VI.

The ruling complained of relates to contributory negligence.

This has been found against the plaintiff by the jury and the verdict reduced Eight thousand dollars because of it, but, nevertheless, there was no error.

The request was that if the towerman changed the light "after Kinney reached a point where he "could not see it." he was not chargeable with knowledge of it, etc.

This is another of the appellant's straw men. He argues as if the court had charged that Kinney was under no obligation to make any further observations after he first saw the light. On the contrary, the court repeatedly charged Kinney with every obligation in the matter.

"The Court: (Reading). 'That even though the jury finds that the light on dwarf 6 was green when Kinney claims to have seen it, that if before he reached or passed it it was changed to purple, or danger,'—I suppose you can insert there that he saw it—

Mr. Spratt: Or ought to have seen it.

The Court: Or ought to have seen it. I will put it that way. '—that it was his duty to stop.'

Mr. Ward: Yes, I consent to that as amended." (Fol. 2327).

"Mr. Spratt: I am in a little doubt about that. I would like to have your Honor charge it.

The Court: I think I have already charged the proposition pretty clearly, but I will charge it again. 'That if Kinney was in doubt as to the color of the light on dwarf No. 6, whether it was green or purple, it was his

duty to stop before passing it.' That is under the rule to which I have drawn the jury's attention.

The eleventh, I have granted that also, 'That if Kinney could not see the dwarf light and was depending entirely on Mallon's signal and was in doubt as to whether Mallon's signal was a come-ahead or a stop signal, it was his duty to stop before passing the dwarf, and if he failed to do so, he was negligent.' That is granted.

Mr. Sprott: I withdraw twelve and thirteen." (Fol. 3332).

"The Court: Fourteen, 'That if at any time Kinney was in doubt as to what the signals given were, whether the signal from the dwarf or the signal from the lantern of Mallon, then it was his duty under the rules to stop.' That is pursuant to the rule which has been drawn to the attention of the jury.

The fifteenth, I have granted.

Mr. Sprott: That is also withdrawn.

The Court: The sixteenth I have granted.

Mr. Sprott: I would not that." (Fol. 3333).

"The Court: I will grant that with a slight modification, I think. It reads, 'That if the lantern signals which the plaintiff saw Mallon give were seen by him to extend from the horizontal line of Mallon's outstretched arm, and to disappear each time on the downward swing, past the vertical line of Mallon's body and the right hand corner of the caboose'—the way it was drawn here it was that 'the jury must find that Kinney received the stop signal and that he should have recognized it as such.' I will not charge the latter part. I will say that the jury may find from the evidence which they believe that Kinney received the stop signal and that he should have recognized it as such." (Fol. 3336).

"The Court: Now, twenty-six, that I have granted as modified, so that I will read that, 'That if the jury find that Kinney was relying solely on Mullen's hand signal, and if they find further that Mullen was not negligent in the manner in which he gave the hand signal, and that his signal was in fact a stop signal, and that the steam escaping from the engine did not interfere with Kinney's observation of Mullen's signals, and that the defendant was not negligent in any other respect claimed, then if Kinney was uncertain as to whether Mullen's signal meant a stop signal or a come-ahead signal, the failure of Kinney to stop before passing the dwarf must be considered contributory negligence, which was the sole cause of the accident and which bars a recovery." (Fol. 3344).

"The Court: Now comes twenty-seven. That I have modified. The request is, 'That if the jury find that Kinney was uncertain as to whether Mullen's signal was a stop signal or a come-ahead signal, and that Mullen's signal was in fact a proper stop signal, and that the defendant was not negligent in any other respect claimed, then the failure of Kinney to stop before passing the dwarf must be considered contributory negligence, which was the sole cause of the accident and which bars a recovery.'

Mr. Ward: I consent to that.

The Court: You consent to that without modification?

Mr. Ward: Yes.

The Court: So that we will let that stand. You are so charged." (Fol. 3347).

"Twenty-eight is the next. I have granted it. It reads, 'If Mullen's hand signals were properly communicated to Kinney and showed a proper stop signal, the defendant cannot be charged with liability solely because

Kinney misinterpreted the signal.' I will grant that." (Fol. 3348).

And in this I believe the court erred in favor of the defendant, as no such duty was imposed on Kinney, in the opinion of this court, on the first trial. He had a right to rely on the defendant's observance of its own rule and practice after having once seen the light. (See testimony of Dowd, page 62; Dorgan, page 361; Kinne, page 343 and Peck, page 236).

Nevertheless, it was because of the charge of Judge Bissell that he owed further obligations that the finding of contributory negligence and the corresponding reduction in the verdict was made by the jury.

This request relates to contributory negligence, and as that has been found, I fail to see how the defendant can complain.

POINT VII.

There was no error in the charge referred to by the defendant under this point.

A reading of the charge complained of will show the court that it has no connection with the matter argued.

Mullen had admitted that when he was giving the signals he stood with his back against the caboose, which was ahead of Kinney, instead of leaning out where Kinney could see him. This was his testimony on the first trial of the action,

and while in the subsequent five trials he tried to depart from it, nevertheless, when pressed, had always admitted its truth. (Fols. 1928-1945). So that, from this position, if he had been giving a stop signal, the part visible to Kinney would have appeared to be a proceed signal. This was demonstrated on the witness stand by a number of locomotive engineers in the employ of the defendant, and who were subpoenaed and sworn by the plaintiff. (See Fols. 732-735-738-741-745-747).

Of course, it made no difference what signal Mullen was giving, unless he was giving them in such a position that Kinney could see them. That was what the court charged, and not, as the defendant claims in his point, that Kinney was excused from reading "plain stop signals." There is no such language in the charge, and the point made is another straw man raised by the defendant to protract this litigation, which has now lasted for thirteen years.

The plaintiff, in the prime of life, lost one leg; had the other permanently crippled and received a crushed pelvis. The issue litigated on six trials was whether or not the plaintiff received a comeahead signal from a fixed light as he approached it at a time when he had a right to assume that he could be governed by it. Everything else was incidental. Only three persons were in a position to see this light. One of them, the signal man, although claiming that the light was set against him remained in his position until the moment of the collision, and failed to apply his brakes or take

any steps to prevent it; the other was Kinney, a careful and experienced engineer, who not only swore that the light was in his favor as he approached it, but that the fireman so announced it to him. On all of the six trials the fireman was in the court room, and *in the defendant's employ, but was never sworn.* Four juries that listened to Kinney believed him, and found in his favor. One jury disagreed, and one found against him through an erroneous direction of the court.

As was said in the history of the case, reported in (98 Misc., page 8), through no fault of the plaintiff or his counsel, he has lost the benefit of three verdicts, verdicts rendered where the jury found that there was no blame whatever on the plaintiff. It would seem that the defendant has little to complain of when the jury has found that the plaintiff was in part to blame for the accident and has reduced the verdict accordingly.

POINT VIII.

It is respectfully submitted that the petition for a writ of certiorari should be denied; that there is no plain or manifest error in this case and no question requiring the intervention of this court.

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courts.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY *v.* KINNEY.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 110. Argued November 21, 1922.—Decided December 4, 1922.

Where a complaint in an action for personal injuries alleges facts which may constitute the wrong either under the state law or the Federal Employers' Liability Act, according to the nature of the employment, an amendment alleging that the parties at the time of injury were engaged in interstate commerce does not introduce a new cause of action, and may be allowed after the two-year limitation prescribed by § 6 of the act has run. P. 345.

190 App. Div. 967; 231 N. Y. 578, affirmed.

CERTIORARI to a judgment of the Supreme Court of New York, entered on remittitur from the Court of Appeals, affirming a judgment for the plaintiff, Kinney, in an action for personal injuries against the Railroad Company. There were several trials in the New York courts before the amendment passed upon here was made. See 98 Misc. 8; 171 App. Div. 948; 217 N. Y. 325; 185 App. Div. 903; 190 App. Div. 967; 231 N. Y. 578.

Mr. Maurice C. Spratt, with whom *Mr. Herbert W. Huntington* was on the briefs, for petitioner.

The amendment to the complaint alleging engagement of the plaintiff and defendant in interstate commerce introduced an entirely new cause of action, and having been made more than two years after the cause of action accrued was barred by the statute of limitations contained in § 6 of the federal act. The statute having been

pleaded and proven the defendant was entitled to judgment.

While this Court has upheld amendments where the original complaint pointed, although imperfectly, to a cause of action under the laws of Congress, as in *Seaboard Air Line Ry. v. Renn*, 241 U. S. 290, or where the amendment involved merely the substitution of the personal representative of the deceased, as in *Missouri, Kansas & Texas Ry. Co. v. Wulf*, 226 U. S. 570, we do not find that this Court has yet passed upon the question where the facts were as here, except that the logic of the opinion in the *Renn Case* leads unerringly to the conclusion that under facts similar to those in this case the amendment would not have been permitted.

No claim has been or can be made that the plaintiff attempted to maintain or commence any action under the federal statute for eight years after the cause of action accrued.

The cause of action was based squarely upon the New York Employers' Liability Act. There was not only an allegation in the complaint of the service of a notice under the provision of said act, but a copy of the notice alleged to have been so served was attached to the complaint.

Furthermore, upon none of the first three trials of this case was any proof given of interstate commerce nor was it even suggested that either might have been so engaged. Nor did the defendant's answer set up engagement in interstate commerce as a defense. For eight years this suit was absolutely silent as to interstate commerce.

If plaintiff was engaged in interstate commerce, then his original complaint failed to state any cause of action under the state act, the Federal Employers' Liability Act being exclusive and superseding all state laws upon the same subject. By coming into court and alleging that the plaintiff was engaged in interstate commerce, the plaintiff admits that the action as brought and three times tried

could not be maintained. It is not merely the addition of further grounds of liability. It is even more than a substitution of one cause of action for another. It is the substitution of the right to maintain an action barred by the express limitations of the federal statute, in place of a cause of action in which plaintiff has been substantially defeated.

Assume that by final judgment the plaintiff had been defeated in his action under the state act, could he then, eight years after the accident, successfully institute and maintain suit under the federal statute?

The original complaint by its plain language excluded all suggestion of right under the federal statute. The amended complaint excludes all rights under the state statute. The cause of action originally pleaded was wholly inconsistent with the cause of action set forth in the amended complaint. Each excludes the other. Discussing: *Union Pacific Ry. Co.* v. *Wyler*, 158 U. S. 285; *Seaboard Air Line Ry.* v. *Renn*, 241 U. S. 290; *Troxell* v. *Delaware, Lackawanna & Western R. R. Co.*, 227 U. S. 434; *American R. R. of Porto Rico* v. *Didricksen*, 227 U. S. 145; *Gulf, Colorado & Santa Fe Ry. Co.* v. *McGinnis*, 228 U. S. 173; *Hogarty* v. *Philadelphia & Reading Ry. Co.* 255 Pa. St. 236; *Allen* v. *Tuscarora Valley R. R. Co.*, 229 Pa. St. 97; *Hall* v. *Louisville & Nashville R. R. Co.*, 157 Fed. 464; *Hughes* v. *New York, O. & W. R. R. Co.*, 158 App. Div. 443; *Carpenter* v. *Central Vermont Ry. Co.*, 93 Vt. 357; *Ryan* v. *New York Central & Hudson River R. R. Co.*, 171 App. Div. 958; *Findley* v. *Coal & Coke Ry. Co.*, 76 W. Va. 747; *Fort Worth & Rio Grande Ry. Co* v. *Bird*, 196 S. W. 597; *Walker* v. *Iowa Central Ry. Co.*, 241 Fed. 395; Roberts, Federal Liability of Carriers, § 696, pp. 1210–1212.

Mr. Hamilton Ward for respondent.

If interstate commerce appears upon the trial, the case must be determined by the federal law. The plaintiff can

sue to recover for the wrong done; and the law to be administered, whether state or federal, is determined by the facts proved. A sufficient allegation to establish a cause of action in tort does not necessarily involve the mention of any statute. Where an action is duly commenced by the proper party within the time fixed by the statute of limitations, amendments which do not set up a new cause of action are within the discretion of the court and are not controlled by the statute of limitations. A recovery may be had, where the facts proved warrant it, under the Federal Employers' Liability Act without an express allegation in the pleadings that the parties are engaged in interstate commerce, if such proof be made upon the trial and the defendant be not surprised thereby. An amendment setting up the fact that the parties "at the times and in the manner above set forth were then and there engaged in interstate commerce" does not set up a new cause of action.

Payne v. *New York, S. & W. R. R. Co.*, 201 N. Y. 440; *Lee* v. *Central of Georgia Ry. Co.*, 252 U. S. 109; *Toledo, St. Louis & Western R. R. Co.* v. *Slavin*, 236 U. S. 454; *Seaboard Air Line Ry.* v. *Koennecke*, 239 U. S. 352.

If the federal law would have been applied without the amendment, upon proof of interstate commerce, it would seem idle to ask this Court to say that the allowance of such an amendment, which was justified by the proof, and which was merely in support of the cause of action originally alleged, justifies this Court in setting aside the verdict and granting a new trial. *Smith* v. *Atlantic Coast Line R. R. Co.*, 210 Fed. 761; *Missouri, Kansas & Texas Ry. Co.* v. *Wulf*, 226 U. S. 570; *Davis* v. *New York, Lake Erie & Western R. R. Co.*, 110 N. Y. 646; *St. Louis, San Francisco & Texas R. R. Co.* v. *Smith*, 243 U. S. 630; s. c. 171 S. W. 512; 160 S. W. 317; *Illinois Central R. R. Co.* v. *Lanis*, 246 U. S. 652; s. c. 140 La. 1; *Baltimore & Ohio R. R. Co.* v. *Smith*, 246 U. S. 653; s. c. 169 Ky. 593; *Cur-*

tice v. *Chicago & Northwestern Ry. Co.*, 162 Wisc. 421; s. c. 166 Wisc. 594; 247 U. S. 510.

A recovery can be had under the federal statute without an allegation of interstate commerce in the complaint within two years, where the action has been duly commenced and interstate commerce appears upon the trial, and no different elements of negligence are sought to be established by the plaintiff. *Texas & Pacific Ry. Co.* v. *Cox*, 145 U. S. 593; *Vickery* v. *New London R. R. Co.*, 87 Conn. 634; *Gainesville Midland Ry.* v. *Vandiver*, 141 Ga. 350; *Jorkson* v. *Grand Rapids, etc. R. R. Co.*, 189 Mich. 537; *Bird* v. *Fort Worth, etc. Ry. Co.*, 109 Tex. 323; s. c. 196 S. W. 597; *Nashville, etc. Ry. Co.* v. *Anderson*, 134 Tenn. 666; *Ziknik* v. *Union Pacific R. R. Co.*, 95 Neb. 152; s. c. 239 U. S. 650; *Broom* v. *Southern Ry.*, 115 Miss. 493; *Gropp* v. *Great Atlantic & Pacific Tea Co.*, 161 App. Div. 859; *Smith* v. *Atlantic Coast Line R. R. Co.*, 210 Fed. 761.

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit for personal injuries to the plaintiff, the respondent in this Court, caused by the collision of a train upon which he was employed by the defendant, the petitioner, as an engineer, with a train of the Michigan Central Railroad Company. After several trials and about seven years and a half after the suit was begun the plaintiff was allowed to amend his complaint by alleging that at the time of the collision the plaintiff and defendant were engaged in interstate commerce. He got the present judgment under the Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65; the jury having found that the parties were so engaged. The defendant contended that the amendment introduced a new cause of action and under § 6 of the act could not be allowed after the two years' limitation had run. See also Act of April 5, 1910,

c. 143, 36 Stat. 291. A writ of certiorari was granted to dispose of this doubt.

The original complaint set forth facts that would have given a cause of action at common law, under the statutes of New York or the act of Congress, as one or another law might govern. It alleged a notice, required by the New York statute and to that extent pointed to that. The amended complaint, against the petitioner alone, while it introduced the allegations objected to, retained the allegation as to notice, and was treated by the trial Court, seemingly with the approval of the higher Courts of the State, as warranting a recovery under either law as the jury should find. There is nothing in the statutes of the United States to prevent this form of pleading, as is indicated incidentally in the case that we are about to cite upon the main point.

In *Missouri, Kansas & Texas Ry. Co.* v. *Wulf*, 226 U. S. 570, the declaration was by the mother as sole heir and next of kin of an employee of the plaintiff in error, in terms referring to a statute of Kansas giving her a right of action for injuries resulting in death. An amendment was allowed, more than two years after the injury, in which the plaintiff declared both as sole beneficiary and next of kin and as administratrix and relied both on the Kansas law and on the act of Congress. The plaintiff got a judgment under the act of Congress which was sustained by this Court although the original declaration by the plaintiff could not be attributed to the Employers' Liability Act, because the plaintiff sued only in her personal capacity and relied for that, as she had to, upon the Kansas law. 226 U. S. 576. It is true that the fact of the injury arising in interstate commerce was pleaded by the defendant. But it was pleaded as a bar to the action as it then stood and only makes more marked the changes that the amendment introduced. We do not perceive that the effect of the amendment in that case distinguishes it from

this. It really is a stronger case, because, as we have said, here the declaration was consistent with a wrong under the law of the State or of the United States as the facts might turn out. The amendment "merely expanded or amplified what was alleged in support of the cause of action already asserted . . . and was not affected by the intervening lapse of time." *Seaboard Air Line Ry.* v. *Renn*, 241 U. S. 290, 293. "The facts constituting the tort were the same, whichever law gave them that effect." *Seaboard Air Line Ry.* v. *Koennecke*, 239 U. S. 352, 354. See also *St. Louis, San Francisco & Texas Ry. Co.* v. *Smith*, 243 U. S. 630. Of course an argument can be made on the other side, but when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and we are of opinion that a liberal rule should be applied.

We shall not discuss at length other points that technically are open but that did not induce the granting of the writ, such as the sufficiency of the evidence that the parties were engaged in interstate commerce, the instruction as to assumption of risk, &c. We see no sufficient reason for disturbing the judgment and it must stand.

Judgment affirmed.